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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

LETANTIA BUSSELL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether a conviction for making, or conspiring to make, a false statement violates due process when based on a response that is truthful under a reasonable interpretation of an ambiguous government question.

2. Whether the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, authorizes an order of restitution against a criminal defendant for losses caused by acts of which the defendant has not been convicted, including conduct of which the defendant was acquitted.

3. Whether an increase in a sentence of imprisonment based on consideration of acquitted conduct violates the Fifth and Sixth Amendments.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
PETITION FOR A WRIT OF *CERTIORARI*	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Procedural History	5
1. District court proceedings	5
2. The court of appeals' first opinion	9
3. The district court's ruling on remand	10
4. The court of appeals' second opinion	11
REASONS FOR GRANTING THE PETITION	13
I. REVIEW IS REQUIRED TO RESOLVE A CIRCUIT CONFLICT OVER THE CONSTITUTIONALITY OF A CONVICTION FOR MAKING A FALSE STATEMENT, WHERE THE STATEMENT IS NOT FALSE UNDER A REASONABLE INTERPRETATION OF AN AMBIGUOUS GOVERNMENT QUESTION	13

TABLE OF CONTENTS—Continued

Page

A. The Ninth Circuit And Other Circuits Are In Conflict With The Fourth Circuit On The Constitutionality Of False Statement Convictions Where The Statement Is Made In Response To An Ambiguous Government Question 14

B. The Fourth Circuit Is In Accord With This Court's Precedent And Due Process 17

C. This Conflict Is Longstanding, Affects Several Federal Criminal Statutes, And Can Be Appropriately Resolved In This Case 19

II. THE NINTH CIRCUIT'S AFFIRMANCE OF RESTITUTION BASED ON ACQUITTED CONDUCT MERITS REVIEW BECAUSE IT CONFLICTS WITH OTHER CIRCUITS AND IS CONTRARY TO THE PLAIN MEANING OF A FEDERAL STATUTE 24

A. The Circuits Disagree On Whether Restitution May Be Imposed For Acquitted Conduct Under The VWPA 25

B. The Ninth Circuit's Ruling Cannot Be Squared With The Plain Text Of The Statute And Raises Constitutional Doubt 35

C. This Court's Review Is Warranted To Eliminate Significant Sentencing Disparities Across The Country 37

TABLE OF CONTENTS—Continued

Page

III. THIS COURT SHOULD GRANT REVIEW TO ELIMINATE UNCERTAINTY ABOUT WHETHER A TERM OF IMPRISONMENT MAY BE INCREASED BASED ON ACQUITTED CONDUCT, OR ALTERNATIVELY, HOLD THIS CASE FOR *OREGON V. ICE*, NO. 07-901 38

CONCLUSION 40

Appendix A: Opinion of the United States Court of Appeals for the Ninth Circuit, dated September 27, 2007 ..... 1a

Appendix B: Opinion of the United States Court of Appeals for the Ninth Circuit, dated July 12, 2005 ..... 30a

Appendix C: Amended Judgment and Probation/Commitment Order of the United States District Court for the Central District of California, dated February 27, 2006 ..... 56a

Appendix D: Order of the United States District Court for the Central District of California, dated February 3, 2006 ..... 66a

Appendix E: Tentative Ruling of the United States District Court for the Central District of California, dated January 30, 2006 ..... 69a

Appendix F: Tentative Ruling of the United States District Court for the Central District of California, dated September 9, 2002 ..... 91a

Appendix G: Order of the United States District Court for the Central District of California, dated February 7, 2001 ..... 115a

TABLE OF CONTENTS—Continued

Page

Appendix H: Order of the United States Court of Appeals for the Ninth Circuit, dated September 6, 2005 ..... 117a

Appendix I: Order of the United States Court of Appeals for the Ninth Circuit, dated December 5, 2007 ..... 119a

Appendix J: 18 U.S.C. §§ 3663, 3664 (1994 Edition) 121a

Appendix K: Excerpts of Schedule B—Personal Property filed in the United States Bankruptcy Court for the Central District of California 129a

Appendix L: Excerpts of Statement of Financial Affairs filed in the United States Bankruptcy Court for the Central District of California 137a

Appendix M: Excerpts of Redacted First Superseding Indictment of the United States District Court for the Central District of California, dated January 31, 2002 ..... 140a

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....37, 38

Blakely v. Washington, 542 U.S. 296 (2004).....37, 38

Bouie v. City of Columbia, 378 U.S. 347 (1964).....17

Bronston v. United States, 409 U.S. 352 (1973).....17, 19

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).....18

Hughey v. United States, 495 U.S. 411 (1990) .....*passim*

Marks v. United States, 430 U.S. 188 (1977).....18

Pasquantino v. United States, 544 U.S. 349 (2005).....37

Rogers v. Tennessee, 532 U.S. 451 (2001).....17

Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003).....18

United States v. Adams, 363 F.3d 363 (5th Cir. 2004).....32, 33, 34

United States v. Akande, 200 F.3d 136 (3d Cir. 1999).....32, 34, 35

United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc).....10

United States v. Anderson, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978).....16, 17

United States v. Bennett, 943 F.2d 738 (7th Cir. 1991), *cert. denied*, 504 U.S. 987 (1992).....29, 30

United States v. Booker, 543 U.S. 220 (2005).....38, 39

TABLE OF AUTHORITIES—Continued

Page

United States v. Booth, 309 F.3d 566 (9th Cir. 2002) 28

United States v. Boyd, 222 F.3d 47 (2d Cir. 2000) 29

United States v. Camper, 384 F.3d 1073 (9th Cir. 2004), *cert. denied*, 546 U.S. 827 (2005) 14, 15, 20

United States v. Chaney, 964 F.2d 437 (5th Cir. 1992) 29, 33

United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994) 32

United States v. Culliton, 328 F.3d 1074 (9th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004) 9, 13, 14, 20

United States v. Damrah, 412 F.3d 618 (6th Cir. 2005) 14, 15

United States v. DeSalvo, 41 F.3d 505 (9th Cir. 1994) 27

United States v. Enmons, 410 U.S. 396 (1973) 18

United States v. Farmer, 137 F.3d 1265 (10th Cir. 1998) 14, 15, 20

United States v. Feldman, 338 F.3d 212 (3d Cir. 2003) 10

United States v. Foley, 508 F.3d 627 (11th Cir. 2007) 29

United States v. Frith, 461 F.3d 914 (7th Cir. 2006) 30

TABLE OF AUTHORITIES—Continued

Page

United States v. George, 403 F.3d 470 (7th Cir.), *cert. denied*, 546 U.S. 1008 (2005).....30, 31, 35, 36

United States v. Grice, 319 F.3d 1174 (9th Cir.), *cert. denied*, 539 U.S. 950 (2003).....28

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 516 U.S. 840 (1995).....17, 19, 20

United States v. Harriss, 347 U.S. 612 (1954).....17, 18

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996).....29

United States v. Jeffery, No. 93-6295, 1994 WL 468099 (10th Cir. Aug. 25, 1994), *cert. denied*, 513 U.S. 1196 (1995).....34

United States v. Johnson, 132 F.3d 1279 (9th Cir. 1997).....27

United States v. Kane, 944 F.2d 1406 (7th Cir. 1991).....25, 31

United States v. Kones, 77 F.3d 66 (3rd Cir. 1996).....34

United States v. Lattimore, 127 F. Supp. 405 (D.D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955).....19

United States v. Lawrence, 189 F.3d 838 (9th Cir. 1999).....27

United States v. Leahy, 438 F.3d 328 (3d Cir.), *cert. denied*, 127 S. Ct. 660 (2006).....36

United States v. Lighte, 782 F.2d 367 (2d Cir. 1986).....14, 15, 20

TABLE OF AUTHORITIES—Continued

Page

United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991) 14

United States v. Martellano, 675 F.2d 940 (7th Cir. 1982) 15

United States v. McKenna, 327 F.3d 830 (9th Cir.), *cert. denied*, 540 U.S. 941 (2003) 20

United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000) 11

United States v. Nichols, 169 F.3d 1255 (10th Cir.), *cert. denied*, 528 U.S. 934 (1999) 36

United States v. Pedroni, 45 Fed. Appx. 103, 111 (3d Cir.), *cert. denied*, 537 U.S. 1045 (2002) 32

United States v. Polichemi, 219 F.3d 698 (7th Cir. 2000), *cert. denied*, 531 U.S. 1168 (2001) 32

United States v. Race, 632 F.2d 1114 (4th Cir. 1980) ..... *passim*

United States v. Randle, 324 F.3d 550 (7th Cir. 2003) 30, 38

United States v. Reed, 80 F.3d 1419 (9th Cir.), *cert. denied*, 519 U.S. 882 (1996) 12, 27

United States v. Robbins, 997 F.2d 390 (8th Cir.), *cert. denied*, 510 U.S. 948 (1993) 14

United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) 27

United States v. Ryan, 828 F.2d 1010 (3d Cir. 1987) 14, 15, 20

TABLE OF AUTHORITIES—Continued

Page

United States v. Wesland, 23 F.3d 205 (8th Cir. 1994) 35

United States v. Watts, 519 U.S. 148 (1997) 38

United States v. White, No. 05-6596, 503 F.3d 487 (6th Cir. 2007) 39

United States v. Williams, 552 F.2d 226 (8th Cir. 1977) 15

United States v. Woodley, 9 F.3d 774 (9th Cir. 1993) 10

CONSTITUTION & STATUTES

U.S. Const. amend. V 1, 37

U.S. Const. amend VI 2, 37, 40

18 U.S.C.

§ 2 10

§ 152(1) 6

§ 152(2) 6

§ 152(3) 6, 20

§ 1001 20

§ 1014 20

§ 1621 20

§ 1623 20

§ 3579 25

§ 3580 25

§ 3580(a) 25

TABLE OF AUTHORITIES—Continued

Page

§ 3663 ..... 25, 36, 38

§ 3663A 25, 26, 29, 33, 38

§ 3663(a)(1) 25

§ 3663(a)(2) 25, 26

§ 3663(a)(3) 25

§ 3664 25

26 U.S.C. § 7201 7

28 U.S.C. § 1254(1) 1

Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789 (1990) 26

Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) 25

Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982) ..... *passim*

MISCELLANEOUS

Black's Law Dictionary (8th ed. 2004) 21, 23

U.S.S.G. § 2F1.1 (1994) 8

PETITION FOR A WRIT OF *CERTIORARI*

Letantia Bussell respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming petitioner's conviction (App., *infra*, 30a-55a) is reported at 414 F.3d 1048. The opinion of that court affirming petitioner's sentence on appeal after remand (*id.* at 1a-29a) is reported at 504 F.3d 956. The relevant district court orders (*id.* at 56a-116a) are not published.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on September 27, 2007. Petitioner's petition for rehearing *en banc* was denied on December 5, 2007. On February 22, 2008, Justice Kennedy granted an extension of time within which to file a petition for a writ of *certiorari* to and including April 3, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the United States Constitution, U.S. Const. amend. V, provides that

"[n]o person shall *** be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution, U.S. Const. amend VI, provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed *** and to be informed of the nature and cause of the accusation."

The relevant provisions of the Victim and Witness Protection Act (1994)("VWPA") are set forth at App., *infra*, 121a-128a.

INTRODUCTION

The courts of appeals are in conflict regarding the constitutionality of a conviction for making a false statement where the statement responds to an ambiguous government question and is truthful under one reasonable interpretation of the question, but false under another. The circuits are in conflict as well on the use of acquitted conduct to impose restitution under the VWPA. The use of acquitted conduct also has created great confusion with regard to increasing a term of imprisonment. This Court's review is necessary to resolve these conflicts that result in different rules for federal criminal prosecutions in different jurisdictions across the country.

STATEMENT OF THE CASE

A. Factual Background

Petitioner was indicted, along with her husband, on charges related to their alleged concealment of assets and alleged false statements in connection with filing for bankruptcy. App., *infra*, 32a. Petitioner was acquitted of certain charges and convicted of others. *Id.* at 33a. The district court sentenced her to serve 36 months in prison and to pay approximately $2.3 million in restitution. *Id.* at 33a-34a.

1. The allegations against petitioner, a practicing dermatologist, and her husband, formerly a cardiac anesthesiologist, generally derived from financial determinations made a few years before the couple declared bankruptcy. The couple received an IRS deficiency notice in 1991. Pet. C.A. No. 02-50495 Brief, at 6 (Nov. 6, 2003)(hereinafter "Pet. Br."). They received advice from attorneys Jeffrey Sherman and Robert Beaudry, and undertook to reorganize their business affairs according to that advice. Unbeknownst to petitioner and her husband, attorneys Sherman and Beaudry, and Sherman's law and accounting firm, the "Tax Consulting Group" (TCG), routinely advised clients to structure their finances in illegal ways in order to minimize costs and avoid tax liability. *Id.* at 3-4.

Attorneys Sherman and Beaudry recommended a three-tier structure for petitioner's dermatology practice that separated the business aspects of the enterprise from the medical aspects. App., *infra*, at

3a. This structure addressed petitioner's desire that the practice be able to continue uninterrupted in the event of her incapacity from her then recently diagnosed insulin dependent diabetes. Pet. Br. at 6, 8. The lawyers formed two new medical management corporations—BBL Medical Management, Inc. and Beverly Hills Dermatology Medical Corp.—and one medical corporation—L.B. Bussell, Inc. BBL Medical Management was structured to accept the gross receipts, pay the overhead expenses, and retain 80 to 90 percent of the practice's profits. App., *infra*, 3a. Beverly Hills Dermatology received the remainder of the profits and employed petitioner through L.B. Bussell, Inc., a professional corporation with respect to which petitioner was the sole shareholder and officer. *Ibid.* The stock of BBL Medical Management and Beverly Hills Dermatology was held by, or in the name of, other, third-party doctors and medical management professionals; neither petitioner nor her husband was a shareholder or officer of those entities. *Ibid.*

Attorneys Sherman and Beaudry established another corporation that received disability insurance payments for petitioner's husband and that held a security interest in a condominium in Park City, Utah. *Id.* at 3a-4a.

2. On March 7, 1995, petitioner and her husband filed a joint petition for Chapter 7 bankruptcy relief, which their attorney Sherman signed and submitted. *Id.* at 4a. The petition asserted certain asset values and debt totals and included the standard bankruptcy form as an attachment. The

form included a Schedule of Personal Property that asked, in Question 12, for a listing of the debtors' "[s]tocks and interests in incorporated and unincorporated businesses." *Id.* at 133a. It also included a Statement of Financial Affairs that asked, in Question 16, for disclosure of any business in which the debtors served as an "officer, director, partner, or managing executive." *Id.* at 139a. Neither BBL Medical Management nor Beverly Hills Dermatology was listed in response to these questions. *Id.* at 43a.

The petition declared that petitioner and her husband had assets valued at slightly more than $1.78 million and debts of approximately $4.67 million. *Id.* at 4a. The total debt scheduled to be discharged was $3.05 million. *Ibid.* Due to a pending adversary proceeding with respect to one claimed liability, however, the bankruptcy court ultimately discharged $2.29 million of debt. *Ibid.*

B. Procedural History

1. District court proceedings

Petitioner, her husband, and attorney Sherman were subsequently indicted on charges of conspiracy to conceal assets, concealment of assets to avoid paying creditors (including the IRS), and making false statements related to a bankruptcy filing. App., *infra*, 4a. A 17-count superseding indictment was

handed down against the three defendants. *Id.* at 140a-175a.[1] Petitioner was named in 9 of the 17 counts. *Id.* at 4a-5a. Count One charged the three defendants with engaging in a conspiracy, the object of which was to conceal specified property in contemplation of bankruptcy, to make false statements in the bankruptcy filing, and to conceal specified assets. *Id.* at 140a, 148a-149a. Counts Two through Four charged the three defendants with fraudulent concealment from the bankruptcy trustee and creditors of the estate's beneficial ownership interests in BBL Medical Management and Beverly Hills Dermatology, and the estate's equity interest in the Utah condominium, in violation of 18 U.S.C. §§ 152(1), 2. *Id.* at 166a-167a. Counts Five and Six alleged that the three defendants knowingly and fraudulently made false declarations and statements in the bankruptcy filing, in violation of 18 U.S.C. §§ 152(3), 2. *Id.* at 167a-170a. Count Eleven charged petitioner with making a false oath and account by testifying in a civil proceeding that she was not actively involved in any corporation other than L.B. Bussell Inc., in violation of 18 U.S.C. § 152(2). *Id.* at 170a-172a. Counts Twelve and Seventeen alleged that the three defendants attempted, aided, and abetted evasion of taxes by falsely stating in their

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[1] Attorney Beaudry pleaded guilty to a separate information alleging tax fraud, and testified as the government's key witness. Pet. Br. at 3, 21. Attorney Sherman entered into a plea agreement following the superseding indictment. App., *infra*, 5a.

returns the taxable income and the amount of tax due, in violation of 26 U.S.C. § 7201. *Id.* at 172a-175a.

Petitioner and her husband moved to dismiss the false-statement counts on the ground that their conviction on those charges would violate due process because the relevant questions on the bankruptcy form were ambiguous. The district court denied the motion. *Id.* at 43a.

Petitioner and her husband were then tried jointly before a jury. They introduced evidence to demonstrate that they had relied upon the advice of their lawyers in structuring their financial affairs and in completing the bankruptcy forms. *Id.* at 33a.

After the jury began its deliberations, petitioner's husband fell to his death from a hotel balcony. *Id.* at 33a. Pursuant to a supplemental instruction from the court stating that the case against petitioner's husband "had been disposed of," *id.* at 34a, the jury continued to deliberate with respect to the charges against petitioner alone.

On February 6, 2002, the jury returned its verdict and found petitioner not guilty of concealing her equity interest in the Utah condominium from the bankruptcy estate (Count Four). The jury also found her not guilty of making a false oath or account when she testified in a civil proceeding that the only corporation with which she was actively involved was L.B. Bussell Inc. (Count Eleven). And the jury found her not guilty of attempted tax evasion for 1996 (Count Seventeen). *Id.* at 5a. The jury convicted

petitioner of conspiracy (Count One), concealment of beneficial ownership interests in BBL Medical Management and Beverly Hills Dermatology (Counts Two and Three), making a false statement in relation to a bankruptcy case (Counts Five and Six), and tax evasion (Count Twelve). *Id.* at 4a-5a. Each of the counts of which petitioner was convicted was based, in whole or in part, on answers to ambiguous bankruptcy form questions.

At sentencing, the district court concluded that, for purposes of then-applicable Sentencing Guideline §2F1.1, the intended loss was the entire amount of debt scheduled to be discharged in the bankruptcies—$3.05 million.[2] *Id.* at 97a, 102a. That total included the equity interest in the Utah condominium, even though petitioner had been acquitted of the alleged concealment of that interest. Petitioner objected to, *inter alia*, the length of her imprisonment being based in part on acquitted conduct. *See id.* at 101a-103a. The court rejected all of petitioner's objections to the loss calculation which, if accepted, would have resulted in a 6-level increase rather than a 13-level increase above the base offense level. *Id.* at 97a. The court sentenced petitioner to 36 months in prison and three years of supervised release. *Id.* at 71a, 58a.

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[2] The courts below applied U.S.S.G. § 2F1.1, as it appeared in the 1994 Sentencing Guidelines manual, to avoid *ex post facto* issues. App., *infra*, 7a.

The court ordered that petitioner make criminal restitution payments in the amount of $2.3 million, which reflected the court's intended loss figure minus a settled debt. *Id.* at 53a, 111a-112a. Petitioner objected to the restitution and asserted that restitution under the VWPA should be limited to actual loss directly related to the conduct of which she had been convicted. *Id.* at 112a.

2. The court of appeals' first opinion

The Ninth Circuit affirmed in part, vacated in part, and remanded. The court rejected petitioner's argument that she could not be convicted for making false statements because of the ambiguity of the questions on the bankruptcy form. App., *infra*, at 42a-47a. The court explained that, although "[t]he answer to a 'fundamentally ambiguous' question 'may not, as a matter of law, form the basis of a prosecution for perjury or false statement'[,]" "we do not invalidate a conviction 'simply because the questioner and respondent might have different interpretations' of the relevant questions." *Id.* at 44a (quoting *United States v. Culliton*, 328 F.3d 1074, 1078-1079 (9th Cir. 2003)). The court determined that the context demonstrated that petitioner had knowingly and intentionally supplied false answers in light of her understanding of the questions. *Id.* at 45a-46a.

The court of appeals deferred consideration of substantive challenges to petitioner's imprisonment

term and remanded the case for the district court to determine whether it would have imposed a materially different sentence had it known that the guidelines were advisory. *Id.* at 53a (citing *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005)(en banc)).

On restitution, the court of appeals noted that, under the VWPA, the amount of restitution is "limited by the victim's *actual* losses." *Id.* at 54a (quoting *United States v. Woodley*, 9 F.3d 774, 780 (9th Cir. 1993))(emphasis in original). The court vacated the restitution order, because it had been erroneously based on intended loss, and remanded the case for the district court "to determine the actual losses caused by [petitioner's] fraudulent conduct—that is, to compare 'what actually happened with what would have happened if [she] had acted lawfully.'" *Id.* at 54a-55a (quoting *United States v. Feldman*, 338 F.3d 212, 220-221 (3d Cir. 2003)).

3. The district court's ruling on remand

The district court declined to reopen the sentencing proceedings or recalculate petitioner's guideline range on remand because the court would not have imposed a materially different sentence under an advisory guideline system. App., *infra*, 86a-88a.

The district court reaffirmed its restitution order (less approximately $9,000 that Sherman had paid). *Id.* at 88a. The court stated that the $2.3 million figure "represents the actual losses defendant

inflicted on victims" "as a result of her conspiracy conviction in Count One." *Id.* at 88a, 89a.

4. The court of appeals' second opinion

The court of appeals affirmed. App., *infra*, 1a-29a. The court upheld the sentence of 36 months in prison, which was based on a loss calculation to which petitioner objected because it included acquitted conduct. *Id.* at 11a-13a; *see also id.* at 101a-102a. The Ninth Circuit cited the Sentencing Guideline on relevant conduct and merely stated that, "[i]n determining relevant conduct for sentencing purposes in a fraud case, a district court may consider fraudulent conduct by the defendant other than that for which evidence was offered at trial." *Id.* at 12a n.8 (quoting *United States v. Munoz*, 233 F.3d 1117, 1126 (9th Cir. 2000)).

The court of appeals rejected petitioner's claim that the restitution order was improper because it included the value of all assets that had been allegedly concealed, even though she had been acquitted of concealing certain of those assets and had not been charged with concealing some of the other assets on which the restitution amount was based. *Id.* at 21a-23a. The court of appeals disagreed with petitioner's reliance on *Hughey v. United States*, 495 U.S. 411 (1990), which had held that restitution may be awarded under the VWPA "only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 21a (quoting *Hughey*, 495

U.S. at 420). The Ninth Circuit concluded that *Hughey* "is of no avail to [petitioner] because Congress amended the VWPA by expanding the definition of 'victim,' in part to overrule that decision." *Ibid.* The court reasoned that, under the amended statute, "when someone is convicted of a crime that includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, the court can order restitution for losses resulting from any conduct that was part of the scheme, conspiracy, or pattern of criminal activity." *Id.* at 22a (quoting *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir.), *cert. denied,* 519 U.S. 882 (1996))(emphasis omitted). Because petitioner was "convicted of a crime that included a conspiracy 'as an element of the offense,'" *ibid.*, the Ninth Circuit concluded that the district court properly considered as part of the restitution order all of the assets allegedly concealed as a result of the conspiracy, even the equity in the Utah condominium, which petitioner was acquitted of concealing, *id.* at 22a-23a.

The court of appeals denied a petition for panel rehearing and rehearing *en banc*. *Id.* at 119a-120a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS REQUIRED TO RESOLVE A CIRCUIT CONFLICT OVER THE CONSTITUTIONALITY OF A CONVICTION FOR MAKING A FALSE STATEMENT, WHERE THE STATEMENT IS NOT FALSE UNDER A REASONABLE INTERPRETATION OF AN AMBIGUOUS GOVERNMENT QUESTION

The courts of appeals generally acknowledge that a defendant may not be convicted for making a false statement in response to a government query if the government's question is impermissibly ambiguous, but they have different views of what level of ambiguity is impermissible. *See United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003), *cert. denied,* 540 U.S. 1111 (2004); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980). The courts of appeals apply different legal standards to evaluate such ambiguity and ultimately come to different conclusions regarding when a false statement conviction based on a response to an unclear question must be vacated. This Court should grant a writ of *certiorari* to address this divergence of opinions, which affects false statement prosecutions under a variety of federal statutes.

A. The Ninth Circuit And Other Circuits Are In Conflict With The Fourth Circuit On The Constitutionality Of False Statement Convictions Where The Statement Is Made In Response To An Ambiguous Government Question

1. The Ninth Circuit upheld petitioner's conviction for false statements in response to questions from the government even though the questions were ambiguous. The court ruled that the evidence sufficiently indicated that petitioner subjectively understood the questions in a manner that rendered her responses false.

The Ninth Circuit requires reversal of a false statement conviction on due process grounds only when the government question is "fundamentally" ambiguous. Under that view, which is shared by several other circuits, a question is "fundamentally" ambiguous only when persons "of ordinary intelligence cannot arrive at a mutual understanding of [the question's] meaning." *United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004)(quoting *Culliton*, 328 F.3d at 1078), *cert. denied*, 546 U.S. 827 (2005); *see also United States v. Damrah*, 412 F.3d 618, 627 (6th Cir. 2005); *United States v. Farmer*, 137 F.3d 1265, 1268-1269 (10th Cir. 1998); *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir.), *cert. denied*, 510 U.S. 948 (1993); *United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991); *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987); *United States v.*

Lighte, 782 F.2d 367, 375 (2d Cir. 1986); *United States v. Martellano*, 675 F.2d 940, 942 (7th Cir. 1982).

A finding of "fundamental" ambiguity is a rare exception under that approach. *See Damrah*, 412 F.3d at 627. Generally, in those courts, the government's question is found merely to contain "some ambiguity," and those courts will not set aside the indictment or conviction as a matter of law. *Camper*, 384 F.3d at 1076; *Ryan*, 828 F.2d at 1015. Rather, they allow such cases to go to a jury, and they require that the jury "decide[ ] which of the plausible interpretations of an ambiguous question the defendant apprehended and responded to." *Camper*, 384 F.3d at 1076; *see also Farmer*, 137 F.3d at 1269. Those courts reject a challenge to a criminal conviction so long as the evidence was sufficient to enable a reasonable jury to conclude that "the response given was false as the defendant understood the question." *Lighte*, 782 F.2d at 375 (quoting *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977)).

2. The Fourth Circuit "takes a very different approach," as the Ninth Circuit previously has recognized. *Camper*, 384 F.3d at 1077.

The Fourth Circuit holds that a prosecution for making a false statement in response to an ambiguous government question cannot be sustained if "the defendant's statement *** accords with a reasonable construction" of the question. *Race*, 632 F.2d at 1120. The Fourth Circuit requires that the defendant's answer be objectively false under all

reasonable interpretations of the question in order to support a conviction for making a false statement. *Ibid.* Due process requires that the government "negative any reasonable interpretation that would make the defendant's statement factually correct." *Ibid.* (quoting *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978)). The Fourth Circuit emphasizes that its approach is required because "one cannot be found guilty of a false statement *** beyond a reasonable doubt when his statement is within a reasonable construction of the [question]." *Ibid.*

The Fourth Circuit does not view the matter to be one for a jury to resolve as a question of proof regarding the defendant's subjective interpretation of the question, as the Ninth Circuit below did. Instead, the Fourth Circuit evaluates falsity of a statement as an objective matter. Only if the statement is objectively false under all reasonable interpretations of the question to which the statement responded, is evidence of the defendant's subjective understanding relevant to determine whether the defendant knew that the statement was false when made. *See ibid.*

The Ninth Circuit reads the Fourth Circuit precedent as a "per se rule against [a] perjury conviction for an ambiguous statement." *Id.* at 1078. But the Ninth Circuit describes its own precedent to hold that, "even when a question has two plausible meanings, where the evidence proves that the defendant understood one such meaning and

answered falsely to it, a jury can convict for false statement." *Ibid.*

B. The Fourth Circuit Is In Accord With This Court's Precedent And Due Process

The Fourth Circuit is correct to hold that a conviction for false statement in response to a government question cannot stand unless the government question is unambiguous or, if ambiguous, the statement is false under all reasonable interpretations of the question. *See United States v. Hairston*, 46 F.3d 361, 375-376 (4th Cir.), *cert. denied,* 516 U.S. 840 (1995).

The Fourth Circuit's approach is required by this Court's precedent. More than 30 years ago, this Court made clear in the context of a perjury prosecution that "the burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Bronston v. United States*, 409 U.S. 352, 360 (1973).

The Fourth Circuit's requirement follows from the well-established due process principles of definiteness and fair notice in a criminal prosecution. The government must provide to "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" before criminal sanctions can be imposed. *United States v. Harriss*, 347 U.S. 612, 617 (1954); *see also Rogers v. Tennessee*, 532 U.S. 451, 457 (2001)("criminal statute must give fair warning of the conduct that it makes a crime" (quoting *Bouie v. City*

of Columbia, 378 U.S. 347, 350 (1964)); *Marks v. United States*, 430 U.S. 188, 191 (1977)("[T]he notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty."). "[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)(*per curiam*)(quoting *Harriss*, 347 U.S. at 617).

The rule of lenity in criminal law is rooted in these principles. For the same reasons that a criminal statute must be strictly construed with any ambiguities resolved in favor of an accused, *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 408 (2003)(quoting *United States v. Enmons*, 410 U.S. 396, 411 (1973)), an ambiguous question posed by the government must be strictly construed in favor of one who is being prosecuted for a false response to that question. Questions asked by the government that establish the boundaries for criminal liability cannot, consistent with due process, invite more than one reasonable construction and then allow prosecution for a false response to whichever construction a particular prosecutor selects. Otherwise, an individual who states the truth in response to one such construction will not have sufficient notice that the government intended the question to mean something else and that the individual will be subject to criminal liability for responding falsely under that other interpretation of the question.

This Court has also made clear that a jury in a perjury prosecution may not speculate whether a defendant's answer "was intended to mislead or divert the examiner," but must acquit so long as the defendant's answer was literally true. *Bronston*, 409 U.S. at 359. Similarly, the Fourth Circuit's approach rightly recognizes that, where the government's own imprecision creates more than one reasonable interpretation of its question, the defendant cannot be convicted for an answer that is truthful under the more beneficial construction. *See Hairston*, 46 F.3d at 375-376 (witness cannot be convicted of perjury even if evasive and misleading so long as answers are literally true).

C. This Conflict Is Longstanding, Affects Several Federal Criminal Statutes, And Can Be Appropriately Resolved In This Case

1. The conflict among the courts of appeals on this due process question has deep roots and is unlikely to be reconciled without intervention by this Court. The reasoning of the Ninth Circuit below, that government questions with "some" ambiguity may support a criminal conviction based on a subjective analysis, had its genesis in 1955. *See United States v. Lattimore*, 127 F. Supp. 405, 409 (D.D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955). The Fourth Circuit's contrary rule has been in place for nearly three decades. *See Race*, 632 F.2d at 1114 (decided in 1980).

2. The circuit conflict affects prosecutions under several federal statutes. The current case involves a conviction for false declarations or statements in relation to a bankruptcy case in violation of 18 U.S.C. § 152(3). Other cases have addressed the issue in the context of 18 U.S.C. § 1001, which proscribes making false statements to the federal government in wide-ranging circumstances. *See, e.g., Race*, 632 F.2d at 1115; *Culliton*, 328 F.3d at 1076; *Camper*, 384 F.3d at 1074. Additional cases have involved 18 U.S.C. § 1014, which make it a crime to make a false statement on certain loan or credit applications submitted to any one of a number of federal entities. *Ryan*, 828 F.2d at 1012. Still other cases have involved 18 U.S.C. §§ 1621 and/or 1623, which impose criminal sanctions for false statements made under penalty of perjury, and for false declarations before a grand jury or court, respectively. *See Hairston*, 46 F.3d at 375 (§ 1623); *United States v. McKenna*, 327 F.3d 830, 834 (9th Cir.)(§ 1621), *cert. denied,* 540 U.S. 941 (2003); *Lighte*, 782 F.2d at 369 (§ 1623); *Farmer*, 137 F.3d at 1266 (§ 1623).

3. This case is an appropriate vehicle to resolve the circuit conflict because the questions on the bankruptcy schedules in this case were ambiguous, and petitioner did not provide false responses under reasonable interpretations of those questions.

Question 12 on Schedule B asks the debtor to list "[s]tock and interests in incorporated and unincorporated businesses." App., *infra*, 133a. That question is ambiguous because the term "interests" is

not defined in the form (nor is there a definition in the Bankruptcy Code, the Bankruptcy Rules, or in relevant case law), and it is susceptible to more than one reasonable interpretation. "Interests" could reasonably be construed to refer only to *legal* interests (*i.e.*, "legal title"). *See* Black's Law Dictionary 829 (8th ed. 2004). "Interests" might also include beneficial interests (*i.e.*, a "right or expectancy [other than] legal title"). *Id.* at 828. Furthermore, although the government forms elsewhere asked broad questions that called for a listing of specified types of interests, *see, e.g.*, App., *infra*, 138a (Statement of Financial Affairs Question 11, requiring listing of accounts either in debtor's name or held for debtor's benefit), it did not provide any such listing in Question 12, *id.* at 133a.

Indeed, the extent of ambiguity in the term "interests" in Question 12 required the government to introduce expert testimony at petitioner's trial to explain the term. And even the government's own expert could not provide a definition of "interests"; he acknowledged that the term does not have a commonly understood meaning. He testified that most individual debtors would seek the advice of counsel to define "interests in incorporated and unincorporated businesses." The government's expert agreed that even bankruptcy lawyers could reach different conclusions about the term's meaning. The indictment in this very case did not utilize only the ambiguous term "interest"; the prosecution inserted the phrase "beneficial ownership" to modify "interest"

in the indictment, likely to avoid ambiguity. *Id.* at 167a.

Petitioner did not respond falsely to Question 12 under a construction of the question that equates "interests" with legal interests. Petitioner responded that she owned "100% of stock in L.B. Bussell Medical Corporation." *Id.* at 133a. She disclosed no "interest" in either BBL Medical Management or Beverly Hills Dermatology, *ibid.*, entities in which she held no stock or other legal title.

The response to Question 12 permeated the indictment. *See, e.g.*, App., *infra*, at 155a, 167a, 168a. The failure to disclose petitioner's "interests" in BBL Medical Management and Beverly Hills Dermatology is alleged in, or incorporated into, every count of which petitioner was convicted and served as the centerpiece of the prosecution's case. Accordingly, because the term "interests" was impermissibly ambiguous, petitioner is entitled to vacatur of her conviction on every count.

Question 16(a) on the Statement of Financial Affairs suffers from similar infirmity; it asks the debtor to list all businesses in which he or she was an "officer, director, partner, or managing executive." *Id.* at 139a. Petitioner was not an officer, director, or partner of BBL Medical Management or Beverly Hills Dermatology. Nevertheless, petitioner was charged with failing to disclose that she was a "managing executive" of those businesses. The term "managing executive" is susceptible to various reasonable

interpretations and is not defined in the bankruptcy petition, nor in any statute, rule, or case law. The plain meaning of the term "executive" is "[a] corporate officer at the upper levels of management." Black's Law Dictionary, *supra*, 610. Thus, "managing executive" could reasonably be construed to pertain only to a corporation's executive officers and other similarly situated corporate personnel. Petitioner's response, therefore, was truthful under a reasonable construction of "managing executive." Indeed, the jury acquitted petitioner on Count 11, which charged her with testifying falsely that the only corporation with which she was actively involved was L.B. Bussell, Inc.

Despite the ambiguities of these government questions, the Ninth Circuit refused to set aside petitioner's convictions for false statements because the court concluded that the terms "interests" and "managing executive" were not "fundamentally" ambiguous. The court declared that, given "the context of the question and answers, as well as other extrinsic evidence," petitioner answered falsely as she understood the terms. App., *infra*, 44a-46a.[3]

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[3] The government presented no evidence at trial regarding petitioner's actual understanding of the terms. The Ninth Circuit purported to determine petitioner's "understanding" primarily from the context of the questions, concluding that petitioner understood "interests" as the prosecution charged because petitioner answered other questions correctly that contained the same word. App., *infra*, 45a. But petitioner's answers to those other questions, like her answer to Question 12, were consistent with an interpretation of "interests" to mean

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By contrast, if petitioner had been prosecuted in the Fourth Circuit, her conviction would have been reversed as a violation of due process because petitioner did not answer falsely under a reasonable construction of the government's questions. *See Race*, 632 F.2d at 1120 ("[O]ne cannot be found guilty of a false statement *** when his statement is within a reasonable construction of the [question].").

II. THE NINTH CIRCUIT'S AFFIRMANCE OF RESTITUTION BASED ON ACQUITTED CONDUCT MERITS REVIEW BECAUSE IT CONFLICTS WITH OTHER CIRCUITS AND IS CONTRARY TO THE PLAIN MEANING OF A FEDERAL STATUTE

This Court has read "the language and structure" of the VWPA, to "make plain Congress' intent to authorize an award of restitution only for the loss caused by *the specific conduct that is the basis of the*

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legal interests. Moreover, the Ninth Circuit mistakenly opined that if petitioner thought "interests" referred only to legal interests, she should have listed beneficial interests in Question 33, *ibid.*, which asked for "[o]ther personal property of any kind not already listed," *id.* at 136a. The first 32 questions on Schedule B, however, enumerated myriad types of personal property, such as interests in pension plans, interests in businesses, intellectual property, and even boats and aircraft. *Id.* at 133a-135a. Question 33 was a catchall question, asking for any other *property*, not any other *interests*; importantly, petitioner was not charged with making a false response to Question 33.

offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990)(interpreting 18 U.S.C. §§ 3579, 3580(a)(1982))(emphasis added).

The Seventh Circuit and some other circuits adhere to *Hughey* and hold that a district court lacks authority to order restitution for conduct of which a defendant has been acquitted. *See United States v. Kane*, 944 F.2d 1406, 1415 (7th Cir. 1991). But the Ninth Circuit applies a different rule, relying on a statutory amendment that it reads to overrule *Hughey* in cases involving conduct related to a conspiracy or scheme. That interpretation cannot be reconciled with the statutory text.

A. The Circuits Disagree On Whether Restitution May Be Imposed For Acquitted Conduct Under The VWPA

1. The VWPA provides that a district court may order restitution by "a defendant *convicted of an offense*" under the federal criminal code to "any victim *of such offense.*" App., *infra*, 121a (18 U.S.C. § 3663(a)(1)(1994)(emphasis added)).[4] In *Hughey v.*

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[4] The VWPA (Pub. L. No. 97-291, 96 Stat. 1248 (1982)) was first codified at 18 U.S.C. §§ 3579 and 3580, and recodified at 18 U.S.C. §§ 3663, 3664, effective November 1987. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. In 1996, Congress enacted the Mandatory Victims Restitution Act ("MVRA"), which was codified at 18 U.S.C. § 3663A. At present, 18 U.S.C. § 3663(a)(1)-(3) contains the re-codified VWPA and addresses *discretionary* restitution, while the MVRA's

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United States, this Court read that plain language to mean that restitution must "be tied to the loss caused by the offense of conviction." 495 U.S. at 418. There the indictment had charged the defendant with using 21 stolen credit cards, thereby causing more than $90,000 in losses, but the defendant pleaded guilty to the use of only *one* card that resulted in a $10,000 loss. *Id.* at 414. The *Hughey* Court ruled that restitution was limited to that lesser amount and that the district court had erred when it imposed a restitution order for the amount related to the entire alleged scheme. *Id.* at 414-415.

Congress amended the VWPA that same year to expand the definition of "victim" by adding the following language to 18 U.S.C. § 3663(a)(2):

> For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4863.

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provisions, 18 U.S.C. § 3663A, concern *mandatory* restitution. Courts have relied upon cases that implicate either statute when addressing the question presented here. The VWPA applies here because the alleged conduct took place prior to 1996.

2. The Ninth Circuit has read that statutory expansion of the category of victims who can be compensated through restitution to somehow expand the scope of conduct that can support restitution. The Ninth Circuit thus declared that the amendment to the VWPA "overruled" *Hughey* as applied in cases where the defendant is convicted of participating in a conspiracy or scheme. *United States v. DeSalvo*, 41 F.3d 505, 515 (9th Cir. 1994); *accord United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999); *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997); *Reed*, 80 F.3d at 1423. The Ninth Circuit has held that, if the crime of conviction "includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense," *Reed*, 80 F.3d at 1423 (emphasis omitted), "the court can order restitution for losses resulting from *any* conduct that was part of the scheme," even conduct of which the defendant has not been convicted. *Ibid.* (emphasis added).[5]

The Ninth Circuit has gone so far as to affirm an order that required a defendant to pay restitution for all the purported losses resulting from an alleged credit card and wire fraud scheme that was set forth in a 113-count indictment, even though the defendant was convicted of only two counts related to that scheme. *See United States v. Johnson*, 132 F.3d 1279,

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[5] The Ninth Circuit continues to apply *Hughey* where the crime of conviction does *not* include, as an element, a conspiracy or scheme. *Lawrence*, 189 F.3d at 846; *see, e.g.*, *Reed*, 80 F.3d at 1421, 1423.

1287 (9th Cir. 1997); *see also United States v. Grice*, 319 F.3d 1174, 1179 (9th Cir.)(for mail-fraud convictions, affirming restitution order for acts occurring several years before scheme was alleged to have begun in indictment), *cert. denied,* 539 U.S. 950 (2003).

The Ninth Circuit's broad view of the scope of restitution under the VWPA has led it to allow restitution for losses that resulted from *acquitted* conduct, so long as the government alleges that such acts are part of a conspiracy or scheme. For example, in *United States v. Booth*, 309 F.3d 566 (9th Cir. 2002), two co-defendants were convicted of committing various acts of wire fraud and money laundering in connection with an alleged investment scheme, but the jury acquitted the defendants of certain fraud charges—including the conspiracy charge. *Id.* at 571. Nevertheless, the Ninth Circuit reasoned that, because the specific crimes of which the defendants were convicted required the government to prove participation in a scheme, such crimes "qualify as ones for which restitution may be ordered for all persons directly harmed by the entire scheme." *Id.* at 576. The Ninth Circuit declared that "[r]estitution is *** not confined to harm caused by the particular offenses of which [the defendant] was convicted," *ibid.*, and affirmed a restitution order for "the entire amount of loss caused to victims of the scheme," *id.* at 575.

The Second, Fifth, and Eleventh Circuits have similarly concluded that the VWPA authorizes a

district court to impose restitution for acquitted acts. *See, e.g.*, *United States v. Foley*, 508 F.3d 627, 635-636 (11th Cir. 2007)(rejecting challenge to restitution calculation under MVRA based partly on acquitted conduct); *United States v. Boyd*, 222 F.3d 47, 51 (2d Cir. 2000)("[T]he VWPA confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts ***."); *United States v. Chaney*, 964 F.2d 437, 452 (5th Cir. 1992)(rejecting argument that "'[r]estitution under the [VWPA] is forbidden for losses that may be attributed to conduct that is the basis of charges for which the defendant is acquitted.'"). *See also, e.g.*, *United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996)(under VWPA, court may order restitution in cases involving a conspiracy or scheme "without regard to whether *the particular criminal conduct* of the defendant which directly harmed the victim was alleged in a count to which the defendant pled guilty, or was even charged in the indictment." (emphasis in original)).

3. The Seventh Circuit and other circuits interpret *Hughey* and the VWPA differently.

The Seventh Circuit maintains that "[a]fter *Hughey*, the appropriate focus is on the *conduct* that forms the basis for the offense." *United States v. Bennett*, 943 F.2d 738, 740 (7th Cir. 1991)(emphasis added), *cert. denied,* 504 U.S. 987 (1992). Thus, even in cases in which the offense of conviction is a conspiracy or scheme, the Seventh Circuit continues to follow *Hughey*'s mandate that restitution be awarded only for "the specific conduct" that the

defendant committed in furtherance of the alleged scheme. *Hughey*, 495 U.S. at 413; *see, e.g., United States v. George*, 403 F.3d 470, 474 (7th Cir.)(under *Hughey*, restitution is appropriate only for losses caused by acts that were part of the specific conspiracy of which the defendant was convicted), *cert. denied,* 546 U.S. 1008 (2005).

The Seventh Circuit does not treat a conspiracy conviction as necessarily allowing a restitution order in regard to every aspect of a broadly alleged scheme. Rather, it reads the VWPA to require a link between the specific acts that underlie the conviction and the order for restitution. *See United States v. Frith*, 461 F.3d 914, 921 (7th Cir. 2006)(a restitution order must be "tied to the specific conduct of conviction").

Thus, the Seventh Circuit refuses to interpret the VWPA as a blank check that allows a district court to order any restitution amount requested by the government whenever there is a conspiracy conviction. *See, e.g., United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003)("[U]nder *Hughey*, both the amount of the restitution award and the persons to whom such award may be directed are limited by the circumstances of the offense for which the defendant has been convicted.")(emphasis omitted). And the Seventh Circuit requires that the conspiracy allegations be specific enough to enable the identification and assessment of the particular acts that comprise the scheme and the losses caused by those acts. *See Bennett*, 943 F.2d at 741 (because "[t]he scheme concept is by nature an amorphous one," an award of

restitution is authorized only when a scheme "is defined with specificity").

The Seventh Circuit holds—in direct conflict with the Ninth Circuit below—that a restitution order cannot be based on allegations of which the defendant was acquitted merely because the defendant has been convicted of participation in a conspiracy. *E.g.*, *George*, 403 F.3d at 474 ("*Hughey* requires the court to exclude injuries caused by offenses that are not part of the scheme of which [the defendant] has been convicted.").

In *United States v. Kane*, 944 F.2d 1046, 1414 (7th Cir. 1991), the Seventh Circuit vacated a restitution order that required payment for all losses allegedly caused by a scheme to defraud federally insured banks where the defendant had been acquitted of two (out of five) specific incidents of loan-application fraud that the government had charged in separate counts. The court reasoned that the defendant "was convicted of conspiracy, but the jury's verdicts, taken collectively, *narrow the scope of the conspiracy*," and "must be taken as a judgment that the conspiracy did not include the acts charged in th[e] counts" of which he was acquitted. *Ibid.* (emphasis added); *see also id.* at 1415 ("The jury apparently found that a conspiracy existed, but believed it to consist of three fraudulent loan applications and not five.").

The Ninth Circuit's attempt to distinguish *Kane* as being outdated, App., *infra*, 21a & n.12, is without merit. Prosecutors in the Seventh Circuit "concede

that restitution cannot be ordered that relates to conduct for which the defendant has been acquitted." *United States v. Polichemi*, 219 F.3d 698, 714 (7th Cir. 2000), *cert. denied,* 531 U.S. 1168 (2001).

The Third Circuit interprets the VWPA amendment in a manner similar to the Seventh Circuit, and precludes restitution based on acquitted conduct. *See United States v. Pedroni*, 45 Fed. Appx. 103, 111 (3d Cir.)(where defendant was convicted of conspiracy to defraud the United States and tax evasion, restitution not permitted for "loss associated with the charges for which [defendant] was acquitted"), *cert. denied,* 537 U.S. 1045 (2002); *United States v. Console*, 13 F.3d 641, 674 (3d Cir. 1993)(where defendant was convicted of 24 mail fraud counts but acquitted of 11 others, restitution award was proper because "it covered only the losses associated with offenses for which [defendant] has been convicted" (citing and relying upon *Hughey,* 495 U.S. at 420)), *cert. denied,* 511 U.S. 1076 (1994); *see also United States v. Akande*, 200 F.3d 136, 141 (3d Cir. 1999)("'[T]he offense of conviction,' as defined by *Hughey* [ ], remains the reference point for classifying conduct that determines liability for restitution.").

Although the Fifth Circuit earlier had ruled similarly to the Ninth Circuit, allowing restitution based on acquitted conduct in conspiracy cases, *see* page 29, *supra,* that court more recently has analyzed the issue in the context of guilty pleas in a manner that appears to call into question its earlier rationale. In *United States v. Adams*, 363 F.3d 363 (5th Cir.

2004), the court vacated a restitution order (under the parallel provision of the MVRA, *see*, *supra*, page 25 n.4), where the defendant had entered a plea to two substantive counts that alleged particular instances of mail fraud related to a broad conspiracy that was incorporated by reference into each of the substantive counts. The district court had accepted the plea based on a factual proffer that the two counts resulted in only $34,833 of harm but had ordered restitution of $170,312.31, based on the loss attributable to all of the counts of the conspiracy that named the defendant. *Id.* at 365. The Fifth Circuit vacated the order based on its conclusion that a defendant "is only responsible to pay restitution for the conduct underlying the offense for which he has been convicted," *id.* at 366, and the plea agreement, rather than the indictment, establishes the extent of the scheme of conviction, *id.* at 367.[6]

Like the Seventh Circuit, these other circuits look to the *conduct* of which the defendant is

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[6] The Fifth Circuit's attempted distinction between the entry of a guilty plea—where, in its view, "the scope of the underlying scheme [i]s defined by the parties themselves," *Adams*, 363 F.3d at 367—and a conviction by jury—where the extent of the scheme is defined by the allegations of the indictment notwithstanding the jury's verdict, *Chaney*, 964 F.2d at 452 n.48—is unpersuasive. That is especially so here, where the prosecution charged specific acts in separate counts of the indictment, and although the jury specifically returned a not guilty verdict on the count for concealment of equity in the Utah condominium, the district court included amounts related to that count in its restitution order.

convicted, not merely the existence of a conspiracy, to determine the extent of restitution that the district court is authorized to order under the VWPA. *Adams*, 363 F.3d at 366-367; *accord Akande*, 200 F.3d at 139 (the VWPA "'is not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant related to the scheme, conspiracy, or pattern'" (quoting *United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996))); *see also id.* at 142 (the government "bears the burden of including language sufficient to cover all acts for which it will seek restitution"); *United States v. Jeffery*, No. 93-6295, 1994 WL 468099, *9 (10th Cir. Aug. 25, 1994)(unpub.)(rejecting on *Hughey* grounds the government's argument that, in conspiracy cases involving an ongoing scheme to defraud, restitution may be ordered for all acts made pursuant to the scheme, even if not specifically charged in the indictment), *cert. denied,* 513 U.S. 1196 (1995).

Moreover, rather than defer to the government (or probation officer) about which acts fall within the realm of the conspiracy, such courts have held that judges have a duty to assess the actual extent of the scheme not only by examination of the allegations made in the indictment or at sentencing, but also by consideration of the jury verdict or plea proceedings. *See, e.g., Adams*, 363 F.3d at 366 ("Our review of the restitution order *** compels us to define the scope of the scheme underlying [the defendant's] fraud conviction."); *Akande*, 200 F.3d at 142 (examining "the question of what was the 'offense of conviction'"

in determining the permissible scope of restitution in a conspiracy case); *George*, 403 F.3d at 474 (same).

B. The Ninth Circuit's Ruling Cannot Be Squared With The Plain Text Of The Statute And Raises Constitutional Doubt

1. As noted above, the VWPA authorizes a district court to order restitution by "a defendant *convicted of an offense*" under the federal criminal code only "to any victim *of such offense*." App., *infra*, 121a (emphasis added). The statutory amendment did not change that text in any respect. The "amendment [merely] enlarged the group of victims who would be entitled to restitution, but the triggering event—the offense of conviction—remains the same." *Akande*, 200 F.3d at 141 (citing *United States v. Wesland*, 23 F.3d 205, 207 (8th Cir. 1994)).

A victim of the "offense" of which the defendant was "convicted" cannot, under the plain meaning of the statutory language, be provided restitution for any alleged losses tied to alleged conduct of which the defendant was acquitted. Likewise, where specific conduct was not charged in the indictment, the defendant could not have been "convicted" of that conduct for the purposes of ordering restitution under the statute.

Such is the case here, where the amount of restitution imposed—$2.3 million—could be derived only by including assets that the indictment did not

specifically charge petitioner with concealing, and assets that petitioner was acquitted of concealing. This Court's intervention is required to make plain that restitution may not be ordered for specific acts of which the defendant has not been convicted, whether because of acquittal or because the conduct was never charged in the indictment.

It is no answer that an acquittal by a jury might reflect only that the government did not bear its burden of proof. Under the plain language of the VWPA, restitution is authorized only when the defendant has been *convicted* of an offense, and no matter the reason, being acquitted of engaging in conduct is not a conviction of such conduct.

2. The Ninth Circuit's interpretation of the VWPA as authorizing restitution based on acquitted conduct raises doubts about that provision's constitutionality.

The majority of the courts of appeals have held that a restitution order under 18 U.S.C. § 3663 is a criminal sanction. *See United States v. Leahy*, 438 F.3d 328, 334-335 & n.9 (3d Cir.)(en banc)(collecting cases from the Fifth, Eighth, Ninth, and D.C. Circuits holding that restitution is a criminal penalty "when ordered in connection with a criminal conviction"), *cert. denied*, 127 S. Ct. 660 (2006).[7] This Court has

[7] Some circuits view restitution as a civil remedy. *See George*, 403 F.3d at 473; *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir.), *cert. denied*, 528 U.S. 934 (1999).

also indicated that it views a restitution order as one that "mete[s] out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). As such, a restitution order based on acquitted conduct would implicate the guarantee of a right to trial by jury in a criminal matter under the Fifth and Sixth Amendments. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *accord Blakely v. Washington*, 542 U.S. 296, 303-304 (2004).

C. This Court's Review Is Warranted To Eliminate Significant Sentencing Disparities Across The Country

The restitution order here would not have been allowed by the Seventh Circuit. That is precisely the kind of unwarranted disparity that prompted sentencing reform efforts more than 20 years ago. Such continued disparities in sentencing as a result of different judicial interpretations of the VWPA are a pressing problem that this Court should resolve.

The proper scope of a restitution order in a scheme or conspiracy prosecution is a substantial and recurring issue. It is raised in nearly every fraud case involving a conspiracy allegation. In 2006 alone, more than 9,500 defendants were convicted of fraud-related crimes in federal court, including mail or wire fraud or conspiracy to defraud the United States, *see* Sourcebook Of Criminal Justice Statistics Online, http://www.albany.edu/sourcebook/pdf/t5242006.pdf, and in each of these federal cases, a district court judge

faced the difficult determination of how to calculate the appropriate restitution amount. *See Randle*, 324 F.3d at 558 ("[C]alculating and providing for restitution can be difficult to sort out" and "[d]etermining who are victims and the amount of loss are often not easy tasks.").

This Court's last pronouncement on the subject occurred nearly 18 years ago, before the VWPA's definition of "victim" was amended and before the MVRA was enacted. Since then, nearly every federal court of appeals has interpreted 18 U.S.C. § 3663 in the context of a conviction for conspiracy, and the conflicting interpretations are well-established.

III. This Court Should Grant Review To Eliminate Uncertainty About Whether A Term Of Imprisonment May Be Increased Based On Acquitted Conduct, Or Alternatively, Hold This Case For *Oregon v. Ice*, No. 07-901

In *United States v. Watts*, 519 U.S. 148, 156 (1997), this Court held that reliance on acquitted conduct to determine the length of a defendant's prison sentence does not violate the Double Jeopardy clause. This Court's more recent pronouncements, however, reaffirm that the right to have a jury make factual determinations is critical to constitutionally permissible sentences. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 248-249 (2005); *Blakely*, 542 U.S. at 304; *Apprendi*, 530 U.S. at 489.

In the wake of *Booker*, criminal defendants have vigorously challenged the "relevant conduct" aspect of the Sentencing Guidelines, which authorizes the consideration of conduct proven only to the judge and only by a preponderance of the evidence—even conduct of which the defendant has been acquitted—for the purpose of calculating the term of imprisonment. Although the federal courts of appeals have thus far upheld reliance on acquitted conduct, widespread concern about the practice remains and judges around the country are struggling with this significant constitutional issue. *See, e.g., United States v. White,* No. 05-6596, 503 F.3d 487 (6th Cir. 2007)(panel opinion affirming sentence based on acquitted conduct vacated by grant of rehearing *en banc*).

This Court should decide the issue in this case. Petitioner was sentenced to 36 months of imprisonment based in part on a loss calculation under the guidelines that included amounts related to conduct of which she had been acquitted. Thus, this case provides an appropriate vehicle in which to address the constitutional issues related to the use of acquitted conduct at sentencing. This case is, in fact, superior to others raising the acquitted conduct matter because review in this case would also enable the Court to resolve the conflict over whether a district court is statutorily and constitutionally authorized to order restitution based on acquitted conduct. *See* Part II, *supra*.

If the Court does not grant a writ of *certiorari* in this case, it should at least hold the instant petition pending its disposition of *Oregon v. Ice*, No. 07-901. The Sixth Amendment question in that case—whether an increased sentence can be imposed based on facts found by a judge rather than a jury—is at issue in this case as well, only more so, because the judge in the instant case overrode the will of the jurors by sentencing petitioner on the basis of conduct on which the jury had returned a verdict of not guilty.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted or, in the alternative, the case should be held pending the Court's disposition of *Oregon v. Ice*, No. 07-901.

Respectfully submitted,

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April 3, 2008

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LETANTIA BUSSELL, *Defendant-Appellant.*	No. 06-50088 D.C. No. CR-01-00056-AHS-02
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LETANTIA BUSSELL, *Defendant-Appellant.*	No. 06-50140 D.C. No. CR-01-00056-AHS-01 OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
February 6, 2007 – Pasadena, California

Filed September 27, 2007

Before: Diarmuid F. O'Scannlain, Edward Leavy,
and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Dan Marmalesfsky, Morrison & Foerster LLP, Los Angeles, California, argued the cause for the defendant-appellant, and filed briefs; Heather Pearson, Morrison & Foerster LLP, Los Angeles, California, was on the briefs.

Paul Stern, Assistant U.S. Attorney, Major Frauds Section, Los Angeles, California, argued the cause for the plaintiff-appellant, and filed a brief; Debra Wong Yang, U.S. Attorney, Thomas P. O'Brien, Assistant U.S. Attorney, Chief, Criminal Division, and Ranee A. Katzenstein, Assistant U.S. Attorney, Major Frauds Section, were on the brief.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide whether the district court properly determined the amount of intended loss for purposes of sentencing, and the amount of actual loss for purposes of restitution, resulting from convictions for bankruptcy fraud.

I

Letantia Bussell ("Letantia") is a practicing dermatologist.[1] Her late husband, John Bussell, was a

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[1] As the facts are set out at length in our prior opinion in Letantia's first appeal, we will only briefly discuss the relevant

(Continued on following page)

practicing cardiac anaesthesiologist [sic] until 1992. In 1992, the Bussells were experiencing significant financial difficulties. They owed the Internal Revenue Service ("IRS") and the California State Franchise Tax Board approximately $1.2 million in taxes, interests, and penalties assessed for tax years 1983, 1984, 1986, and 1987. They also owed the Bank of Beverly Hills $787,500.00.

Upon the advice of their former lawyers, the Bussells organized the dermatology practice into a three-tiered structure in 1992. The new arrangement separated the business and medical aspects of Bussells's practice: BBL Medical Management, Inc. ("BBL") received the practice's gross receipts, paid the expenses and overhead, and retained the profits; Beverly Hills Dermatology Medical Corp. ("Beverly Hills Medical") received 10% to 20% of BBL's profits and employed Letantia through her professional corporation, L.B. Bussell, MD, Inc. ("L.B. Bussell, Inc."), for an artificially reduced salary. BBL and Beverly Hills Medical were held in the names of nominee owners; Letantia was the sole shareholder and officer of public record of L.B. Bussell, Inc. The Bussells further enlisted the help of their former lawyers in 1993 to set up various corporations to conceal ownership of a four-unit condominium in the Stein-Ericksen Lodge in Park City, Utah (the "Utah

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facts here. *See United States v. Bussell (Bussell I)*, 414 F.3d 1048 (9th Cir. 2005).

condominium"), a San Diego farm, and receipt of disability insurance income. The Bussells also opened an off-shore bank account to receive funds from John Bussell's pension plan.

On March 7, 1995, the Bussells, together with their former lawyers, filed a joint bankruptcy petition. The Bussells reported total assets of $1,783,026.30 and total debts of $4,677,194.22 on that petition. The amount of debt scheduled for discharge totaled $3,057,927.09, but the bankruptcy court only discharged debt of $2,293,527.09 because a liability of $764,000.00 to Provident was at issue in pending litigation.

Following the bankruptcy discharge, Letantia was charged in a 17-count indictment, along with two co-defendants, with conspiracy, concealment of assets in contemplation of bankruptcy, making false declarations, perjury, and attempted tax evasion. At trial, the Bussells argued that they had acted in good faith and relied on the advice of their lawyers. *Bussell I*, 414 F.3d at 1052. After jury deliberations had begun, John Bussell fell to his death from his hotel room. *Id.*

The jury ultimately convicted Letantia of the following counts charged in the indictment: conspiracy to conceal assets in contemplation of bankruptcy and to make false statements in the bankruptcy (count 1); concealing ownership in BBL, including BBL's bank account with a balance of $949,048.00 (count 2); concealing ownership in

Beverly Hills Medical, including Beverly Hills Medical's bank account with a balance of $5,787.00 (count 3); making false statements in the bankruptcy petition (counts 5 and 6); and willfully attempting to evade a substantial portion of income tax owed for tax years 1983, 1984, 1986, and 1987 (count 12). The jury, however, acquitted Letantia of concealing ownership of the Utah condominium (count 4); making a false oath and account that she was not actively involved with any corporations other than L.B. Bussell, Inc. except on a passive investment basis (count 11); and willfully attempting to evade a substantial portion of income tax owed for 1996 (count 17).

Their former lawyers, Sherman and Beaudry, entered into plea agreements with the government, under which Sherman pleaded guilty to conspiracy and to attempted tax evasion, and Beaudry pleaded guilty to aiding and abetting attempted tax evasion and the filing of false tax returns. *Id.*

Applying the then-mandatory Sentencing Guidelines, the district court sentenced Letantia to a mid-range sentence of 36 months imprisonment. In determining her offense level for purposes of calculating an appropriate Guidelines range, the district court increased the base offense level by 13 levels, finding that the intended loss equaled $3,057,927.09, the amount of debt scheduled for discharge in bankruptcy. The district court also ordered Letantia to pay, in addition to a special assessment and a fine, restitution totaling $2,393,527.00, for which she was jointly and severally liable with attorneys

Sherman and Beaudry, and prosecution costs totaling $62,614.37.

Letantia timely appealed her conviction, her sentence, and the district court's orders of restitution and costs. The government timely cross-appealed Letantia's sentence. In *Bussell I*, we affirmed Letantia's conviction, but ordered a limited remand pursuant to *Ameline*. *Bussell I*, 414 F.3d at 1060. We also vacated the district court's orders of restitution and prosecution costs, and remanded for reconsideration. *Id.*

On remand, the district court declined to reopen sentencing proceedings, concluding that Letantia's sentence would not have materially differed had the Guidelines been advisory at the time of the original sentencing. The district court also ordered restitution of $2,284,172.87, costs of prosecution of $55,626.09, and a criminal fine of $50,000.00.

Letantia timely appealed.

II

We first consider Letantia's various challenges to her sentence.[2]

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[2] "Commentary to the Guidelines binds us in interpreting their provisions unless it violates the Constitution or a federal statute, or is inconsistent with the Guidelines." *United States v. Asberry*, 394 F.3d 712, 716 n.5 (9th Cir. 2005).

A

The Sentencing Guidelines assign a base offense level of six, *see* U.S.S.G. § 2F1.1(a) (1994),[3] and then increase levels according to the amount of loss resulting from the fraud, *see* U.S.S.G. § 2F1.1(b)(1).[4] The accompanying application notes define "loss" as "the value of the money, property, or services unlawfully taken." U.S.S.G. § 2F1.1 cmt. n.7. The application notes further provide that "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S.S.G. § 2F1.1 cmt. n.7. In some cases, "additional factors are to be considered in determining the loss or intended loss." U.S.S.G. § 2F1.1 cmt. n.7 The commentary also explains that "*the loss need not be determined with precision.* The court need only make a reasonable estimate of the

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[3] To avoid ex post facto infractions, the district court applied the 1994 Guidelines. *See United States v. Williamson*, 439 F.3d 1125, 1137 n.14 (9th Cir. 2006) ("The district court must apply the Guidelines in effect when the defendant is sentenced, unless doing so creates ex post facto issues."). We therefore refer to the November 1, 1994, edition throughout this opinion.

[4] We review de novo the district court's interpretation of the Sentencing Guidelines. *United States v. Stoddard*, 150 F.3d 1140, 1145 (9th Cir. 1998). The meaning of "loss" under the Sentencing Guidelines is a question of law reviewed de novo. *Id.* We review for clear error the district court's factual findings, including the calculation of loss to the victims. *United States v. W. Coast Aluminum Heat Treating Co.*, 265 F.3d 986, 990 (9th Cir. 2001).

loss, given the available information." U.S.S.G. § 2F1.1 cmt. n.8 (emphasis added).

The thrust of Letantia's argument is that intended loss should be categorically limited to the value of the concealed assets or the value of her liabilities, whichever is less. She contends that the district court erred by determining her intended loss based on the amount of debt discharged in bankruptcy, $3,057,927.09, rather than by the allegedly much lower net value of the concealed assets, $85,000.00.[5]

This argument appears at first glance to find support in Eighth Circuit precedents. In *United States v. Dolan,* 120 F.3d 856 (8th Cir. 1997), the defendant committed bankruptcy fraud by concealing assets well in *excess* of the debt to be discharged. *Id.* at 862, 870-71. Under those circumstances, the Eighth Circuit concluded that the intended loss should be calculated "by using either the value of the assets concealed or the value of the debtor's liabilities, whichever is less." *Id.* at 870. In contrast to the facts in *Dolan,* in *United States v. Wheeldon,* 313 F.3d 1070 (8th Cir. 2002), the defendant filed for bankruptcy, concealing assets worth much *less* than the debt scheduled to be discharged. *Id.* at 1072. The

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[5] Letantia arrives at this amount by totaling the funds concealed in the BBL Sanwa account ($949,048.00), and the BH Medical account ($5787.00), and subtracting unpaid taxes, interests, administrative expenses, and other possible exemptions.

Eighth Circuit stated in *Wheeldon* that "[i]t belies reality to argue that [the defendant], or a debtor similarly situated, intended to defraud his creditors of everything he owed them solely because he failed to disclose all of his (rather modest) assets." *Id.* at 1073. Accordingly, the Eighth Circuit held that intended loss must be limited to the value of the concealed assets that the defendant's creditors would have known about if the bankruptcy petition had been truthful. *Id.*

Letantia relies on these Eighth Circuit decisions to argue that we should fashion a categorical rule for purposes of sentencing in bankruptcy fraud cases. We decline such invitation. First, in *United States v. Holthaus,* 486 F.3d 451 (8th Cir. 2007), an opinion filed after oral argument in this case, the Eighth Circuit rejected a similar mischaracterization of *Dolan* and *Wheeldon. Id.* at 455. There, the Eighth Circuit expressly held: "There is no blanket rule defining intended loss as the lesser of the value of assets concealed or the value of the debtor's liabilities. Indeed, some factual scenarios may require an intended loss calculation based on the greater of the value of the assets concealed or debt sought to be discharged." *Id.* "When determining intended loss," the Eighth Circuit emphasized, the focus must be on "the amount of loss a defendant actually intended to cause his creditors." *Id.*

Our decision in *United States v. Stoddard,* 150 F.3d 1140, counsels as well against adopting a broad categorical limitation on intended loss. There, we

advised sentencing courts against "mechanically apply[ing]" the Sentencing Guidelines "in calculating loss in fraud cases." *Id.* at 1146 (alteration in original). Instead, we urged sentencing courts "to take a realistic, economic approach to determine what losses the defendant truly caused or intended to cause, rather than the use of some approach which does not reflect the monetary loss." *Id.* (internal quotation marks omitted). "[T]he objective under the economic reality approach is to arrive at a fair assessment of the loss the defendant actually inflicted or intended to inflict, as contemplated by the guidelines." *United States v. Riley,* 143 F.3d 1289, 1292 (9th Cir. 1998).

In light of our precedent, as well as the Eighth Circuit's recent decision in *Holthaus,* we decline to impose a mechanical limitation on intended loss as Letantia urges.[6] We will not tie the sentencing court's hands with such limitation because we do not believe it would reflect the economic reality in every bankruptcy fraud case. In the run-of-the-mill cases where the debtor acts alone and his fraudulent activities consist solely of failing to disclose a concealed asset on the bankruptcy petition, limiting

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[6] The Third, Fifth, and Seventh Circuits have also declined to adopt such a categorical limitation on intended loss. *See, e.g., United States v. Feldman,* 338 F.3d 212, 215-16 (3d Cir. 2003); *United States v. Saacks,* 131 F.3d 540, 542 (5th Cir. 1997); *United States v. Mutuc,* 349 F.3d 930, 936-37 (7th Cir. 2003); *United States v. Holland,* 160 F.3d 377, 380-81 (7th Cir. 1998).

intended loss to either the value of the concealed assets or the debt discharged, whichever is less, may well reflect economic realities. But in cases like the one at bar, where a debtor, together with other co-conspirators, engages in a lengthy, orchestrated scheme to defraud creditors by filing a fraudulent bankruptcy petition, limiting the loss to concealed assets or income will not always reflect economic realities. Accordingly, declining to adopt a categorical rule, we are unpersuaded that the district court erred by not limiting intended loss in the complex bankruptcy fraud case to the value of the concealed assets.

B

Having concluded that the district court's legal interpretation of the Sentencing Guidelines was correct, we now must consider Letantia's argument that the district court clearly erred in its factual determination that the intended loss equaled $3,057,927.09, the amount of debt scheduled to be discharged in the bankruptcy.[7] "To be clearly erroneous," we have often repeated, "a decision must strike us more than just maybe or probably wrong;

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[7] Because we reject Letantia's claim that the district court was required to limit intended loss to the value of concealed assets in this case, we need not reach her subsequent arguments in that line of reasoning, including her argument that the district court erred by not determining the *subjective* value she placed on those assets.

it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Hayes v. Woodford,* 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation marks omitted). No such stench lingers here.

When determining intended loss, we must look to the amount of loss that Letantia intended to cause her creditors. Among other things, Letantia was convicted of conspiring[8] with her husband and former lawyers from about June 1992 until February 1996, with the purpose of discharging her "outstanding debts including a substantial federal tax debt, through filing bankruptcy . . . while maintaining control over and access to (1) property concealed and transferred in the preceding two years in contemplation of bankruptcy, and (2) property of the bankruptcy estate, by means of fraud, concealment and misrepresentation." The evidence establishes, and Letantia admits in her briefs, that she began experiencing significant financial difficulties in 1992,

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[8] Under U.S.S.G. § 1B1.3(a)(1)(B), the relevant conduct for a conspiracy consists of "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." "In determining relevant conduct for sentencing purposes in a fraud case, a district court may consider fraudulent conduct by the defendant other than that for which evidence was offered at trial." *United States v. Munoz,* 233 F.3d 1117, 1126 (9th Cir. 2000). "The district court is entitled to take into account all relevant conduct, charged and uncharged, provided that the relevant conduct findings are supported by sufficient evidence. The caselaw is clear on this point." *Id.* at 1127.

and owed the IRS and the California State Franchise Tax Board in excess of $1.2 million, and the FDIC, as the receiver for the Bank of Beverly Hills, $787,500.00, as well as other substantial debts. The evidence also establishes that over the next several years Letantia engaged her former lawyers to create a number of corporations in the name of nominee owners for the purposes of rerouting the profits from her medical practice, thereby giving the appearance that she owned less assets and earned less income, and moving various real estate holdings and disability payments to other corporations and an off-shore bank account in the name of nominee owners. On March 7, 1995, after the required period had elapsed to discharge the debt for tax deficiencies, Letantia and John Bussell, together with their former lawyers, filed for bankruptcy seeking to discharge debt in the amount of $4,677,194.22. In light of all the facts and circumstances, it cannot be said that the district court clearly erred in finding that Letantia engaged in the conspiracy over four years with the intent fraudulently to inflict a loss on her creditors equal to the debts scheduled for discharge in bankruptcy. *See Holland,* 160 F.3d at 380-81. The strength of this evidence belies Letantia's claim that she only intended a loss of $85,000.00 to her creditors. *See Saacks,* 131 F.3d at 543.

C

We have one final sentencing matter to address. Letantia alternatively argues that, because the

government stipulated in a plea agreement with co-conspirator Sherman that the highest offense level was determined by using the Sentencing Guidelines relating to tax offenses, the government now should be judicially estopped from arguing that the same conspiracy involved a much greater loss for purposes of determining her intended loss. We are unpersuaded by this argument.

First, judicial estoppel "is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one." *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990). The government has made no such contradictory factual assertions in this case. The government simply stipulated in Sherman's plea agreement to apply U.S.S.G. §§ 2T1.1 and 2T4.1, which govern offenses involving taxation, rather than U.S.S.G. § 2F1.1, which governs offenses involving fraud which would otherwise apply in Letantia's case. The government was free to stipulate with Sherman in a separate case involving different charges which Sentencing Guidelines provisions would apply to Sherman.

Moreover, we held in *United States v. Taylor,* 991 F.2d 533 (9th Cir. 1991), "that a disparity in sentencing among co-defendants is not, by itself, a sufficient ground for attacking an otherwise proper sentence under the guidelines. Rather, a defendant can only challenge his sentence by showing that it was the result of incorrect or inadmissible

information, or an incorrect application of the Sentencing Guidelines." *Id.* at 536 (citation and internal quotation marks omitted).

We therefore reject as unpersuasive Letantia's final challenge to the district court's determination of intended loss based on principles of judicial estoppel. Because the district court's determination of intended loss was not erroneous, we affirm Letantia's sentence.

III

We next consider Letantia's argument that the district court's restitution order of $2,284,172.87, the amount of debt actually discharged minus payments by her co-conspirator, was excessive.[9]

In its first restitution order, the district court ordered Bussell, jointly and severally with co-conspirators Beaudry and Sherman, to pay restitution in the amount of $2,393,527.00, which consisted of the debt actually discharged in the bankruptcy proceedings,

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[9] We review de novo the district court's valuation methodology. *See United States v. Lomow*, 266 F.3d 1013, 1020 (9th Cir. 2001). We also review de novo the legality of a restitution award, but if the order is within the statutory bounds, we review the amount for abuse of discretion. *See United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *see also United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004). A district court's factual findings supporting a restitution order, however, are reviewed for clear error. *See United States v. Hackett*, 311 F.3d 989, 991 (9th Cir. 2002).

$2,293,527.09,[10] plus $100,000.00 that John Bussell had agreed to pay in the settlement of related litigation in 2002. In *Bussell I,* we held that the amount of restitution under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(a), which applies to this case, is "limited by the victim's *actual* loss." *Bussell I,* 414 F.3d at 1061 (internal quotation marks omitted). Concluding that the district court "ordered restitution in an amount that, but for an adjustment for a settled debt, was equal to the amount of *intended* losses," we "vacate[d] the order of restitution and remand[ed] to the district court to determine the actual losses caused by Letantia's fraudulent conduct – that is, to compare 'what actually happened with what would have happened if [she] had acted lawfully.'" *Id.* (third alteration in original) (quoting *Feldman,* 338 F.3d at 220-21).

Following remand, the district court ordered Letantia to pay restitution in the amount of $2,284,172.87, which consisted of the debt actually discharged in the bankruptcy proceedings, $2,293,527.09, minus the amount co-conspirator Sherman had already paid, $9,354.22.

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[10] This amount represents the debts schedule for discharge of $3,057,927.09, less $764,400.00 debt to Provident, which was not discharged due to a pending adversary proceeding.

A

Letantia first attacks the restitution order on the ground that the district court failed to apply the proper analysis on remand, as instructed in *Bussell I*. We disagree.

Under the VWPA, the district court may order restitution for criminal offenses committed prior to 1996. *Bussell I,* 414 F.3d at 1061. In considering restitution, the district court must take into account: "(I) the amount of the loss sustained by each victim as a result of the offense; and (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3663(a)(1)(B)(i). We emphasized in *Bussell I* that the amount of restitution under the VWPA is limited to the victim's *actual losses*. 414 F.3d at 1061.

Because "[r]estitution can only include losses directly resulting from a defendant's offense," "a restitution order must be based on losses directly resulting from the defendant's criminal conduct." *Stoddard,* 150 F.3d at 1147 (citations and internal quotation marks omitted). As we also explained in *Bussell I,* actual loss for restitution purposes is determined by comparing "'what actually happened with what would have happened if [the defendant] had acted lawfully.'" 414 F.3d at 1061 (quoting *Feldman,* 338 F.3d at 220-21). Actual loss in this case equals the excess, if any, of (1) the loss the

bankruptcy creditors incurred because of the unlawful conduct, over (2) the loss the creditors would have incurred had Letantia acted lawfully.

The district court concluded on remand that had Letantia acted lawfully by not engaging in a conspiracy to conceal substantial assets and income leading up to the filing of the bankruptcy petition, and had she made full and complete disclosure of her financial affairs at the time of filing the bankruptcy petition, she would *not* have had $2,293,527.09 of debt discharged in bankruptcy. Accordingly, the district court concluded that the actual loss equaled that amount. This conclusion was obviously grounded in the district court's adoption of the 2002 presentence report's ("PSR") factual finding that the value of Letantia's concealed assets exceeded the debt scheduled to be discharged.

The PSR calculated Letantia's assets and debts as of March 7, 1995, when she filed for bankruptcy. The PSR listed concealed assets as:

> [the Bussells'] interests in BBL and Beverly Hills Medical or the Sanwa Bank account, the true amount of J. Bussell's disability income, consulting fees, and rental income, the true market value of their interest in the Stein Eriksen condominium, and their interest in UHL and Magnum. The Bussells did not list any ownership interest in two parcels of farm land in San Diego and a Palm Springs condominium.

The PSR then valued the concealed assets at between $2,849,835.00 and $3,356,835.00.[11] In their bankruptcy petition, the Bussells reported the total value of their assets to be $1,783,026.30. Combining the concealed and reported assets, the PSR concluded, and the district court accepted, that "[a]t the time they filed their bankruptcy petition, the combined value of all of the Bussells' assets exceeded their total debt."

We are persuaded that the district court adequately stated and explained its resolution of the disputed issue as to the value of the concealed assets pursuant to Fed. R. Crim. P. 32 and thereby adopted the factual findings provided in the PSR. *See United States v. Karterman,* 60 F.3d 576, 583 (9th Cir. 1995); *see also United States v. Cannizzaro,* 871 F.2d 809, 811 (9th Cir. 1989). In its tentative ruling at the initial sentencing, the district court rejected Letantia's objections to the PSR's calculation of her assets, finding that "[t]he PSR recites the evidence and other factual matters substantially accurately." In its tentative ruling on post-remand proceedings, the district court found that "[h]ere, the government has demonstrated by a preponderance of the evidence that the defendant caused actual loss in the amount of $2,293,257.09 as a result of her conspiracy

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[11] Though Letantia objected to the PSR's valuation of her assets, the district court overruled the objection except in relation to the debts not discharged in bankruptcy, which do not affect the value of the concealed assets.

conviction in Count One. Had the defendant acted lawfully, she would not have conspired in three years of pre-bankruptcy tax planning so that she and her spouse could conceal substantial income and assets to obtain a fraudulent discharge of their debts." Moreover, at oral argument on post-remand proceedings, the district court declined defense counsel's offer to examine the alleged value of the concealed assets, concluding that "the papers are fairly – very clear about what are the fees to account even if you add in the condo in Palm Springs and Farms and all the rest" and that "the various possible formulae are included in the papers."

In light of the district court's adoption of the factual findings in the PSR, we are unpersuaded that the district court clearly erred in finding that the value of the assets exceeded the debts to be discharged and therefore the actual loss to the creditors equaled the amount of debt actually discharged in the bankruptcy. Letantia's arguments to the contrary are without merit.

B

Letantia argues that the district court erred by not limiting the actual loss to the amount concealed in two bank accounts in the name of BBL and Beverly Hills Medical, two companies held in the name of nominee owners. Letantia was charged with and convicted for conspiring to conceal three specific assets: (1) her "beneficial ownership interest" in BBL,

including BBL's bank account with a balance of $949,048.00; (2) her "beneficial ownership interest" in Beverly Hills Medical, including Beverly Hills Medical's bank account with a balance of $5,787.00; and (3) her equity interest in the Utah condominium. She was also charged and convicted of the substantive offense of concealing her "beneficial ownership interest" in BBL and Beverly Hills Medical, but she was acquitted of the substantive offense of concealing her equity interest in the Utah condominium. Letantia contends that the district court erred by considering concealed assets beyond the two assets in which she was indicted and convicted of concealing.

Letantia relies on *Hughey v. United States*, 495 U.S. 411 (1990), where the Supreme Court interpreted the VWPA and reversed an order that required the defendant to pay restitution for counts other than the counts of conviction. The Court held that "the language and structure of the Act make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 420. But that decision is of no avail to Letantia because, after *Hughey* was decided, Congress amended the VWPA by expanding the definition of "victim," in part to overrule that decision.[12]

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[12] Letantia's reliance on the Seventh Circuit's decision in *United States v. Kane*, 944 F.2d 1406 (7th Cir. 1991), is similarly

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Section 3663(a)(2) of the VWPA now provides that "[f]or purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means *any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.*" 18 U.S.C. § 3663(a)(2) (emphasis added). As we have explained, "[u]nder the amended statute, when someone is convicted of a crime that includes a scheme, conspiracy, or pattern of criminal activity *as an element* of the offense, the court can order restitution for losses resulting from any conduct that was part of the scheme, conspiracy, or pattern of criminal activity. For instance, if someone is convicted of a conspiracy, the court can order restitution for damage resulting from any conduct that was part of the conspiracy and not just from specific conduct that met the overt act requirement of the conspiracy conviction." *United States v. Reed,* 80 F.3d 1419, 1423 (9th Cir. 1996).

Accordingly, because Letantia was convicted of a crime that included a conspiracy "as an element of the offense," the district court did not err in considering all of the concealed assets for purposes of

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misplaced because the acts in that case occurred well before the effective date of this amendment to the VWPA. *See United States v. Rutgard,* 116 F.3d 1270, 1294 (9th Cir. 1997).

determining the actual loss to the bankruptcy creditors.[13]

C

Letantia next contends that the district court erred by ordering any restitution because the IRS was the only creditor that would have received funds from the two concealed bank accounts with a purported net value of $85,000.00, and the IRS had since collected the full amount of the debt it was owed from forfeiture proceedings. We find this argument without merit. For one thing, because this case involved conspiracy, the district court was not limited under the VWPA to considering only the value of the two concealed bank accounts, as discussed above. Moreover, the record establishes that at the time of Letantia's sentencing, she was still contesting the IRS's right to maintain possession of these collected proceeds in U.S. Tax Court proceedings. Because the IRS's right to these funds was still subject to litigation at the time of sentencing, Letantia's

[13] Because we conclude that the district court did not err in considering concealed assets other than the two bank accounts, we reject Letantia's argument that the amount of restitution should not exceed $85,000.00, the purported net value of those bank accounts to the creditors after deducting taxes, administrative expenses, and various exemptions. *See supra* note 5.

argument that the district court erred in ordering any restitution fails.[14]

D

In sum, we are not persuaded that the district court clearly erred in finding that, had Letantia acted lawfully, the value of the assets exceeded the debts to be discharged and therefore the actual loss to the creditors equaled the amount of debt actually discharged in the bankruptcy.[15]

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[14] We are equally unpersuaded, however, by the government's argument that Letantia is entitled to no credit toward restitution for the forfeited assets when the dispute is resolved. Most importantly, the district court's restitution order expressly provides that "[a]ny compensation that a victim receives from other sources, *including forfeited funds and funds resulting from foreclosure on any relevant IRS liens,* shall be counted toward satisfaction of the amount owed in restitution." (emphasis added.) And the government failed to cross appeal that restitution order. Moreover, the government's reliance on *United States v. Bright,* 353 F.3d 1114 (9th Cir. 2004), for the contrary proposition is misplaced, as that case involved the Mandatory Victim and Witness Protection Act of 1996, which the government recognizes is inapplicable in this case. *See United States v. Doe,* 374 F.3d 851, 856 (9th Cir. 2004). The government cites no other authority in opposition.

[15] Letantia requested that we take judicial notices of the Criminal Minutes, Tentative Ruling on Sentencing, and Judgment and Probation Order in the court proceedings of co-conspirator Beaudry. We grant the request for judicial notice. *See Shaw v. Hahn,* 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). We, however, reject Letantia's related argument that the district court erred in not ordering co-conspirator Beaudry to pay restitution pursuant to the Mandatory Victim and Restitution

(Continued on following page)

IV

We next consider Letantia's argument that the district court erred by awarding prosecution costs in the amount of $55,626.09.

In count 12 of the indictment, Letantia was charged with willfully attempting to evade the payment of income tax for the tax years 1983, 1984, 1986, and 1987, in violation of 26 U.S.C. § 7201.[16] Initially, the government requested prosecution costs in the amount of $62,614.37, pursuant to 26 U.S.C. § 7201. The district court declined to allocate costs among counts, opting instead to assess them in their entirety. In *Bussell I,* we vacated and remanded the order for prosecution costs, explaining that "the government cannot assess against a defendant costs associated *exclusively* with the counts on which he was acquitted." 414 F.3d at 1061 (emphasis added). On remand, the district court found that certain costs were associated exclusively with counts on which Letantia was acquitted, or not shown to be necessary

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Act, 18 U.S.C. § 3663A, since that section does not apply to Title 26 offenses, which were the sole offenses to which Beaudry pleaded guilty. *See* 18 U.S.C. § 3663A(a)(1), (c)(1).

[16] Section 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, *together with the costs of prosecution.*" 26 U.S.C. § 7201 (emphasis added).

for a conviction on count 12. Ordering Letantia to pay costs of prosecution in the amount of $55,626.09, the district court expressly excluded certain costs associated with (1) the grand jury transcripts, (2) pretrial and post-trial transcripts, (3) and several witnesses.

In this appeal, Letantia again challenges the district court's factual finding that the remaining costs were not reasonable and necessary for the prosecution of count 12. We are unpersuaded by Letantia's argument. We have not adopted a "reasonable and necessary" standard upon which Letantia relies for the purposes of reviewing prosecution costs assessed against a defendant. Rather, in *United States v. Fowler,* 794 F.2d 1446 (9th Cir. 1986), we held that the government cannot assess costs "associated *exclusively* with the unsuccessful prosecution of [a co-defendant] or his acquittal on [other counts]." *Id.* at 1450 (emphasis in original). We followed that approach in *Bussell I.* 414 F.3d at 106. The district court found on remand that the costs assessed against Letantia were not associated exclusively with the counts in which she was acquitted. Because Letantia presents us with no persuasive evidence to dispute the district court's finding, we affirm the district court's order of prosecution costs.

V

We have one final issue to consider. Pursuant to Fed. R. Crim. P. 38, the district court stayed the 2002 order that Letantia pay a fine, restitution, and prosecution costs, on the condition that two trust deeds be recorded as security against property owned by L.T.K. Irrevocable Trust. In *Bussell I*, we vacated the district court's 2002 order. 414 F.3d at 1061. On remand, Letantia requested that the district court direct the court clerk to reconvey the trust deeds. The district court deferred consideration of the application for reconveyance of the trust deeds. Subsequently, based on its decision to enter a new order imposing restitution, prosecution costs, and a criminal fine on remand, the district court denied the application. Letantia now argues that the district court erred by denying such application for reconveyance.

Trust deeds are generally creatures of state law, and, in California, they operate as a conveyance of real property to secure payment of debt. *See, e.g., Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553-54 (1969). In this case, the trust deeds expressly provided that such deeds were being conveyed as security under Fed. R. Crim. P. 38 for the criminal fine, costs of prosecution, and restitution judgment entered against Letantia in 2002. Pursuant to Cal. Civ. Code § 2941(b)(1), "after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and

other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust."

We are therefore persuaded that the trust deeds in this case should have been reconveyed to the trustee of the L.T.K. Irrevocable Trust (not Bussell) upon the vacatur of the 2002 order for prosecution costs and restitution. The government offers no authority in opposition, and its arguments to the contrary are ultimately unavailing. We note, however, that the district court's post-remand order for restitution and prosecution costs survives the challenges Letantia launches in this appeal and, pursuant to Fed. R. Crim. P. 38(e)(2), the district court "may issue any order reasonably necessary to ensure compliance with a restitution order or a notice order after disposition of an appeal, including . . . (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or (D) an order requiring the defendant to post a bond." Accordingly, we must reverse the district court's denial of Letantia's application for reconveyance of the trust deeds that attached to the now vacated 2002 order for restitution and prosecution costs, and remand for appropriate proceedings.

VI

For the foregoing reasons, we affirm Letantia's sentence and the order for restitution and prosecution

costs. We reverse, however, the district court's denial of the application for reconveyance of the trust deeds.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LETANTIA BUSSELL, *Defendant-Appellant.*	No. 02-50495 D.C. No. CR-01-00056-AHS-02
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. LETANTIA BUSSELL, *Defendant-Appellee.*	No. 02-50528 D.C. No. CR-01-00056-AHS OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
August 6, 2004 – Pasadena, California

Filed July 12, 2005

Before: John T. Noonan, Richard R. Clifton, Circuit Judges, and Jeremy Fogel, District Judge.*

Opinion by Judge Clifton

COUNSEL

Shirley M. Hufstedler, Los Angeles, California; and Dan Marmalefsky, Los Angeles, California, for the defendant-appellant-cross-appellee.

Ronald L. Cheng, Los Angeles, California; and Ranee A. Katzenstein, Los Angeles, California, for the plaintiff-appellee-cross-appellant.

OPINION

CLIFTON, Circuit Judge:

Letantia and John Bussell, together with their former lawyers, were charged with omitting assets from and making false statements in their joint petition for Chapter 7 bankruptcy relief. After the jury began its deliberations following a lengthy trial, John fell to his death from his hotel room. In accordance with the district court's instruction, the jury continued deliberations with respect to Letantia and ultimately convicted her on six counts.

Letantia here appeals her convictions, her sentence, and the district court's orders of restitution

* The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

and costs. As to Letantia's convictions, we discern no reversible error and accordingly, affirm. As to her sentence, which she appeals and the government cross-appeals, we remand for further proceedings pursuant to *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005) (en banc). Finally, as to the district court's orders of restitution and costs, we reverse and remand for reconsideration consistent with this opinion.

I. BACKGROUND

After petitioning for and receiving Chapter 7 bankruptcy relief in 1995, the Bussells were indicted in 2000 for omitting from their joint bankruptcy petition their ownership of a four-unit condominium located in Park City, Utah, and their interests in two corporations related to Letantia's dermatology practice. The charges relevant to the present appeal include one count of conspiring to conceal assets in contemplation of bankruptcy, to make false statements in relation to the bankruptcy, and to conceal assets belonging to the bankruptcy estate; three counts of concealing assets in bankruptcy; two counts of making false statements in bankruptcy; one count of making a false oath and account; and two counts of attempting to evade tax payments.

Before trial, the Bussells moved to dismiss certain of the charges on the ground that the questions posed by the bankruptcy forms were fundamentally ambiguous. Their motion was denied.

Trial, which began on November 20, 2001, was hard-fought and lengthy. The Bussells argued at trial that they had acted in good faith and relied on the advice of their attorneys, Jeffrey Sherman and Robert Beaudry. Both Sherman and Beaudry entered into plea agreements with the government, under which Sherman pleaded guilty to conspiracy and attempted tax evasion, and Beaudry pleaded guilty to aiding and abetting attempted tax evasion and the filing of false tax returns.

On February 5, 2002, after jury deliberations had begun, John fell to his death from his hotel room.[1] After being instructed that the case against John was no longer before them, the jury continued deliberations with respect to Letantia. Letantia was ultimately convicted of six counts (one count of conspiracy, two counts of concealment of assets, two counts of making false statements, and one count of attempted tax evasion), and acquitted of three (one count of concealment of assets, one count of making a false oath and account, and one count of attempted tax evasion).

The district court sentenced Letantia to thirty-six months in custody and ordered her to pay, in addition to a special assessment and a fine, restitution

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[1] Outside the presence of the jury, the district court characterized John's death as a suicide, but Letantia argues that there is no evidence clearly establishing that John took his own life. We need not resolve the question.

totaling $2,393,527.00, for which she was jointly and severally liable with attorneys Sherman and Beaudry, and prosecution costs totaling $62,614.37. Letantia timely appealed her conviction, her sentence, and the district court's orders of restitution and costs. The government timely cross-appealed Letantia's sentence.

II. DISCUSSION

A. Death of the Codefendant

After learning of John's death, the district court expressed concern that the jury was awaiting responses on two questions regarding counts against John and was likely to hear of John's death through the media. The district court accordingly proposed the following version of Ninth Circuit Model Criminal Jury Instruction 2.13:

> The case against codefendant John Bussell has been disposed of and is no longer before you. Do not guess or speculate as to the reason for the disposition. The disposition should not influence your verdict with reference to the remaining defendant, and you must base your verdict solely on the evidence against the remaining defendant.

Absent objections from the government or defense counsel, the district court transmitted the supplemental instruction to the jury.

After her conviction, Letantia moved for a new trial under Federal Rule of Criminal Procedure 33, alleging that jurors had engaged in misconduct by

speculating that John had pleaded guilty. She submitted the declaration of a private investigator, who had learned from interviews of four jurors that during deliberations, "jurors said to each other that perhaps they were not to consider the charges as to John Bussell because he had pleaded guilty in some sort of a plea bargain, as had lawyers Sherman and Beaudry." One of the jurors also submitted a declaration to this effect.

The district court denied the motion without an evidentiary hearing. The court deemed the declarations inadmissible under Federal Rule of Evidence 606(b), rejecting Letantia's argument that they fell within an exception which permits jurors to testify regarding extraneous information improperly brought to their attention. The court further concluded that even if the declarations were admissible, any misconduct they described was "entirely harmless, given the evidence in the case."

On appeal, Letantia argues that the district court erred in informing jurors that the case against John had been disposed of, rather than informing them that he had died. She contends that the incomplete information invited jurors to speculate that John had pleaded guilty, as their attorneys had, and that the prejudice from their speculation "spilled over" to her. She also argues that the district court erred in denying her motion for a new trial because the submitted declarations establish that the jury in fact speculated that John had pleaded guilty.

1. Supplemental Jury Instruction

We review the supplemental jury instruction for plain error because Letantia raised no objection below. *See United States v. Stapleton,* 293 F.3d 1111, 1118 n.3 (9th Cir. 2002). "'Under a plain error analysis, the court may reverse when (1) there was actual error; (2) the error was plain (i.e. 'clear' or 'obvious'); and (3) the error affected the defendant's 'substantial rights.'" *United States v. Pimentel-Flores,* 339 F.3d 959, 967 (9th Cir. 2003) (quoting *United States v. Olano,* 507 U.S. 725, 732 (1993)).

We have not previously addressed the dilemma presented when a codefendant dies during trial. We have, however, considered the dilemma presented when a codefendant enters a guilty plea during trial. *See United States v. Washabaugh,* 442 F.2d 1127 (9th Cir. 1971); *United States v. Jones,* 425 F.2d 1048 (9th Cir. 1970). These cases offer useful guidance.

In *Washabaugh,* we suggested that where a guilty plea is entered late in trial by one of several closely identified defendants, the best course may be simply to tell the jury that the defendant is no longer part of the case. *See* 442 F.2d at 1129. There, a defendant changed his plea "[a]fter most of the evidence was in." *Id.* Although "all three defendants were charged with the same crime in the same count and had sought to escape conviction on the same ground," the district court informed the jury of the changed plea. *Id.* We observed that while informing the jury was not erroneous, "given the close

identification of the defendants with one another in the Dyer Act count and the lateness in the trial, it might have been better simply to tell the jury that [the defendant] was to be considered no longer a defendant in the case and that his guilt or innocence should play no part in future deliberations." *Id.*; *accord* 9th Cir. Model Crim. Jury Instr. 2.13.

Here, as in *Washabaugh,* "close identification" between the defendants and "lateness in the trial" were pressing concerns. With the exception of a single count brought against her only, Letantia was charged with the same crimes in the same counts as John, and she asserted similar, if not identical, defenses of good faith and reliance on the advice of counsel. *Cf.* 442 F.2d at 1129. In addition, John died during jury deliberations. Under these circumstances, where news of John's death might have influenced the ongoing deliberations concerning Letantia, the district court adopted precisely what we have suggested might be the "better" approach: simply informing the jury that John was no longer a defendant in the case. *Id.*

We acknowledge, however, that Letantia's contrary position is not without support. In *Jones,* we concluded that the district court did not plainly err in informing the jury, in a "plain and nonargumentative statement," that three of the defendants were not being tried because they had changed their pleas to guilty. 425 F.2d at 1053. We observed:

> If no explanation is made to a jury of why certain defendants, originally in a criminal case, are no longer participants at the trial, the jury is full of curiosity, conjecture and surmise. Most experienced trial judges think the best, safest and fairest procedure to all is a simple and honest statement to the jury as to why codefendants are no longer such.

Id. Jones, then, suggests that a "simple and honest" statement that John had died may have been preferable.

Still, we are not persuaded that the district court's decision not to provide such an explanation amounted to clear or obvious error. First, *Jones* involved guilty pleas entered early in the trial: one plea was entered before the jury was empaneled and two others were entered after the government made its opening statement. 425 F.2d at 1053. *Washabaugh* suggests that where "lateness in the trial" is a concern, the "better" approach may be simply to tell the jury that the defendant is no longer a part of the case. 442 F.2d at 1129. Second, as noted above, neither *Jones* nor *Washabaugh* involved the specific situation presented here. Finally, Letantia maintains that the supplemental instruction was erroneous because it invited jurors to speculate that John pleaded guilty. Yet *Jones* held that it was not plainly erroneous to advise the jury that a codefendant had in fact entered a guilty plea. [425] F.2d at 1053-54. It follows, then, that advising the jury in a way that

might have permitted speculation regarding a guilty plea also was not plainly erroneous.

2. Motion for New Trial

Of course, Letantia's motion for a new trial went farther, alleging not only that the supplemental jury instruction permitted speculation, but also that jurors did in fact speculate. She maintains on appeal that the jurors' speculation constituted prejudicial extrinsic evidence. We review the district court's denial of a new trial and its decision not to hold an evidentiary hearing for abuse of discretion. *United States v. Mills,* 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya,* 247 F.3d 929, 934, 937 (9th Cir. 2001).

We turn at the outset to the admissibility of the submitted declarations. *See United States v. Maree,* 934 F.2d 196, 201 (9th Cir. 1991). Under Federal Rule of Evidence 606(b):

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any

> outside influence was improperly brought to bear upon any juror.

We do not view the jurors' speculation as "extraneous prejudicial information." Significantly, the alleged source of the speculation – the district court's supplemental instruction – was not extraneous: "It did not enter the jury room through an external, prohibited route," but rather "was part of the trial." *Compare United States v. Rodriquez,* 116 F.3d 1225, 1227 (8th Cir. 1997) (rejecting the argument that the defendant's failure to testify was extraneous information because "[i]t was part of the trial") *with United States v. Keating,* 147 F.3d 895, 903 (9th Cir. 1998) (describing the defendant's prior conviction as extrinsic evidence because it was "entirely new and inadmissible"); *see also United States v. Bagnariol,* 665 F.2d 877, 886 (9th Cir. 1981) (discussing *United States v. Bassler,* 651 F.2d 600, 602 (8th Cir. 1981), in which a juror's notes, which described only what she heard at trial, were found "intrinsic to the deliberations"). The speculation allegedly triggered by the instruction was the product of normal human curiosity, part of the "general knowledge, opinions, feelings, and bias" which we have "carefully distinguished" from "[t]he type of after-acquired information that potentially taints a jury verdict." *Hard v. Burlington N. R.R. Co.,* 870 F.2d 1454, 1461 (9th Cir. 1989). Accordingly, like the district court, we conclude that the submitted declarations are inadmissible under Rule 606(b).

Moreover, even if admissible, the declarations would not warrant a new trial (or an evidentiary hearing, *see Hard,* 812 F.2d at 486) unless there was "'a reasonable possibility that the extrinsic material could have affected the verdict.'" *Keating,* 147 F.3d at 900 (quoting *Dickson v. Sullivan,* 849 F.2d 403, 405 (9th Cir. 1988)). Although our review of the impact of extrinsic material "'is an independent one,'" *id.* (quoting *Dickson,* 849 F.2d at 405), we "'must accord special deference to the trial judge's impression.'" *Mills,* 280 F.3d at 921 (quoting *United States v. Hanley,* 190 F.3d 1017, 1031 (9th Cir. 1999)). As we have acknowledged, the trial judge, who "observes the jurors throughout the trial" and hears the evidence and defenses, "is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature." *United States v. Bagnariol,* 665 F.2d 877, 885 (9th Cir. 1981).

Here, the district court deemed the jurors' alleged speculation harmless. We agree. As described above, we do not believe that the material "'actually received'" by the jury was extrinsic. *Keating,* 147 F.3d at 902 (quoting *Dickson,* 849 F.2d at 406). In addition, the speculation was "ambiguously phrased" – according to the investigator's declaration, jurors said "*perhaps* they were not to consider the charges as to John Bussell because he had pleaded guilty" (emphasis added) – and the district court gave an express instruction that the disposition of the charges against John "should not influence [the] verdict with

reference to the remaining defendant." *See Jeffries v. Wood,* 114 F.3d 1484, at 1491-92 (9th Cir. 1997), *overruled on other grounds by Lindh v. Murphy,* 521 U.S. 320 (1997). Both facts suggest that the potential prejudice of speculation was "diminished." *Id.* at 1491. Finally, we note that with respect to the charges brought jointly against Letantia and John, the jury found Letantia guilty on certain counts, but not guilty on others, indicating that it took care to distinguish the defendants and to render an impartial verdict. *See United States v. Gaggi,* 811 F.2d 47, 53 (2d Cir. 1987). For these reasons, we conclude that the district court did not abuse its discretion in denying the motion for a new trial or in declining to hold an evidentiary hearing.

B. Ambiguity of the Bankruptcy Forms

Approximately two years before declaring bankruptcy, Letantia began operating her dermatology practice through three corporations: BBL Medical Management, Inc.; Beverly Hills Dermatology Medical Corp.; and L.B. Bussell, Medical, Inc. The first corporation, BBL Medical, received all of the practice's income, paid all of its expenses, and retained all of its profits. The Bussells transferred between ten and twenty percent of BBL Medical's profits through the second corporation, Beverly Hills Dermatology, to the third corporation, L.B. Bussell, which then paid Letantia an artificially reduced salary. BBL Medical and Beverly Hills Dermatology were held in the names of "nominee"

shareholders and officers, described in the indictment as persons who are enlisted to serve as owners or officers of public record but have "no genuine ownership interest or actual managerial authority." L.B. Bussell, in contrast, was held in Letantia's name.

In petitioning for bankruptcy relief, the Bussells responded to a number of questions regarding their personal property and financial affairs. At issue here are question 12 of the Schedule of Personal Property, which asked them to list "[s]tock and interests in incorporated and unincorporated businesses," and question 16(a) of the Statement of Financial Affairs, which asked them to list all businesses in which they were an "officer, director, partner, or managing executive." The Bussells did not identify BBL Medical or Beverly Hills Dermatology in response to either question.

Before trial, the Bussells moved to dismiss or strike the allegations based on these questions, arguing that the terms "interests" and "managing executive" are fundamentally ambiguous. The district court denied the motion, characterizing the existence of ambiguity as "a jury question." Letantia reasserted this argument in a post-conviction motion for judgment of acquittal, but that motion was also denied.

On appeal, Letantia continues to argue that questions 12 and 16(a) are fundamentally ambiguous. From this argument, she draws several conclusions:

First, because the questions are fundamentally ambiguous, her answers may not form the basis of a prosecution for false statements. *See United States v. Culliton,* 328 F.3d 1074, 1078 (9th Cir. 2003). Second, absent her answers to these questions, there was insufficient evidence to sustain her convictions on counts five and six of the indictment. Third, given the ambiguity of questions 12 and 16(a), she was entitled to jury instructions supporting her defense that the questions did not clearly call for identification of BBL Medical or Beverly Hills Dermatology. We address these conclusions in turn.

1. Improper Basis for Prosecution

We have not previously defined the standard of review for the dismissal of false statement charges based on fundamental ambiguity. *Id.* at 1078. We need not do so here because we would affirm the determination of the district court even under de novo review. *See id.*

The answer to a "fundamentally ambiguous" question "may not, as matter of law, form the basis of a prosecution for perjury or false statement." *Culliton,* 328 F.3d at 1078. But we do not invalidate a conviction "simply because the questioner and respondent might have different interpretations" of the relevant questions. *Id.* at 1079. Rather, we examine the context of the question and answers, as well as other extrinsic evidence, to determine

whether the respondent provided false answers to the questions "as he understood [them]." *Id.*

The context of question 12 indicates that Letantia understood the question and provided a response that was false in light of her understanding. As an initial matter, we note that the term "interests" appeared in several of the questions surrounding question 12. Question 9 asked for "[i]nterests in insurance policies," question 11 for "[i]nterests in IRA, ERISA, Keogh, or other pension or profit sharing plans," and question 13 for "[i]nterests in partnerships or joint ventures." The fact that Letantia answered each of these questions accurately suggests that she understood the term.

In addition, question 33 asked for "[o]ther personal property of any kind not already listed." Accordingly, if Letantia did not understand her associations with BBL Medical and Beverly Hills Dermatology to constitute "interests" under the specific terms of question 12, she had the option to disclose them as "other personal property" under the broad terms of question 33. *See Culliton*, 328 F.3d at 1079 (rejecting a claim that questions were fundamentally ambiguous because a respondent who "might feel compelled" to provide unreasonable responses had the "option of explaining his or her answers in a separate space provided on the Form"). But she instead responded "[n]one." Her failure to identify the more profitable of the three corporations – in response to either question – belies her present

contention that she made an honest but unsuccessful attempt to understand and respond to question 12.

We reach a similar conclusion with regard to question 16(a), which broadly referred to corporations in which the debtors were an "officer, director, partner, or managing executive." When the Bussells organized BBL Medical and Beverly Hills Dermatology, they approached an employee and a personal friend to serve as owners. Yet the owner and president of BBL Medical, the bookkeeper for Letantia's medical practice, served in those capacities in name only. She testified that the Bussells, not she, oversaw the corporation's operations, including managing its bank accounts, paying its expenses, and controlling its profits. The Bussells in this way played significant roles in operating BBL Medical, but nevertheless omitted it from their response to the broad inquiry posed by question 16(a).

Moreover, even without regard to BBL Medical and Beverly Hills Dermatology, the Bussells failed to disclose that Letantia was the officer of record for L.B. Bussell. That the Bussells did not disclose *any* of their corporate associations – even those which clearly fell within the scope of the question – undermines Letantia's assertion that she attempted to provide a truthful response, but failed to do so because she could not understand the term "managing executive."

2. Insufficient Evidence

We also reject Letantia's claim that there was insufficient evidence to sustain her convictions on counts five and six of the indictment. Counts five and six alleged that the Bussells knowingly and fraudulently made false statements by, among other things, failing to disclose that they held interests in and were managing executives of BBL Medical and Beverly Hills Dermatology. As described above, we conclude that a rational trier of fact could have found that Letantia understood the questions concerning interests and managing executives and provided false answers to these questions as "[s]he understood [them]." *Culliton,* 328 F.3d at 1079. Because we find Letantia's responses to questions 12 and 16(a) sufficient to sustain her convictions on counts 5 and 6, we need not address her additional claim that there was insufficient evidence to support the counts' other allegations. *See Griffin v. United States,* 502 U.S. 46, 56-57 (1991) ("'[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.'" (quoting *Turner v. United States,* 396 U.S. 398 (1970)) (first alteration in original)).

3. Jury Instructions

Letantia maintains that she was entitled to several proposed jury instructions which supported her defense that she did not understand the

bankruptcy forms to require disclosure of the omitted information. Specifically, her proposed instructions would have highlighted that the bankruptcy forms left certain key terms undefined, that a corporation is distinct from its shareholders, and that a shareholder's "interest" in a corporation does not extend to its assets or income.

We review jury instructions de novo to determine whether they adequately presented the defendant's theory of the case. *United States v. Dixon,* 201 F.3d 1223, 1230 (9th Cir. 2000). But because "a defendant is not entitled to any particular form" of instructions, we review their precise formulation for abuse of discretion only. *Id.* at 1230-31.

We conclude that the district court's instructions adequately presented Letantia's defense that she interpreted the bankruptcy forms in good faith. In its lengthy instruction on the subject, the district court informed the jury that good faith was a "complete defense to each of [the bankruptcy – related] charges.["] The court explained that a person who acted in good faith – that is, based "on a belief or opinion honestly held" – was "not punishable under these statutes merely because the belief or opinion turn[ed] out to be inaccurate, incorrect, or wrong." Criminal punishment was instead reserved for "those people who knowingly defraud or attempt to defraud."

Given these statements, which adequately presented Letantia's good-faith defense, we cannot say that the district court abused its discretion in

rejecting the additional instructions. *See United States v. Sarno,* 73 F.3d 1470, 1485 (9th Cir. 1995). Although, as Letantia urges, the additional instructions might have supported the honesty of her beliefs,"[a] defendant may not draw upon the right to present a 'theory of the case' to compel a certain resolution to a disputed question of fact." *United States v. Sarno,* 73 F.3d 1470, 1485 (9th Cir. 1995); *accord United States v. Felix-Gutierrez,* 940 F.2d 1200, 1211 (9th Cir. 1991).

C. Prior Bad Acts of Bankruptcy Counsel

In a declaration made shortly after he entered into his plea agreement, the Bussells' former lawyer, Robert Beaudry, stated that he and Jeffrey Sherman had advised not only the Bussells, but also three other clients in "implement[ing] essentially this same structure . . . in furtherance of similar bankruptcy and tax fraud schemes." The Bussells argued before the district court that testimony regarding these prior bad acts would establish that Beaudry and Sherman assured other clients that their fraudulent schemes were entirely legal, buttressing the Bussells' defense that Beaudry and Sherman provided them with similar assurances. In support of their motion, they submitted the declaration of John's defense lawyer, who had interviewed two of Beaudry's former clients and discovered that they believed his work to be "100% legitimate" and completely "above board." Beaudry's defense lawyer, however, revealed that Beaudry had performed acts for these clients "which

could conceivably be the basis of impeachment . . . under Rule 608(b) of the Federal Rules of Evidence."

The district court granted the government's pre-trial motion to exclude the proffered testimony, finding in part that its probative value was substantially outweighed by the dangers of confusing the issues and delaying the trial. *See* Fed. R. Evid. 403. The district court reasoned that the testimony would indicate the alleged pattern only if Beaudry's other clients were in fact "innocent dupes." Yet determining the clients' innocence would require a potentially confusing and time-consuming "trial within a trial."

Letantia contends on appeal that no such trial was necessary because she intended to show only that Beaudry and Sherman had a pattern of advising clients that their advice was legal. This showing, she maintains, would have required only brief testimony by Beaudry's former clients.

We review the evidentiary ruling for abuse of discretion, according "'considerable deference'" to the district court's determination under Rule 403. *United States v. Hankey,* 203 F.3d 1160, 1166-67 (9th Cir. 2000) (quoting *United States v. Cordoba,* 194 F.3d 1053 (9th Cir. 1999)). Further, because the alleged error is nonconstitutional, an abuse of discretion would warrant reversal only if it "'more likely than not affected the verdict.'" *Id.* at 1167 (quoting *United States v. Ramirez,* 176 F.3d 1179, 1182 (9th Cir. 1999)).

Mindful that "'[t]he Rule 403 weighing process . . . is primarily for the district court to perform,'" we conclude that the district court did not abuse its discretion. *See Cordoba,* 194 F.3d at 1063 (quoting *United States v. Layton,* 767 F.2d 549, 553 (9th Cir. 1985)). Though defense counsel might have limited the testimony to the advice received by Beaudry's former clients, their knowledge (or lack thereof) would nevertheless have remained relevant. Indeed, even limited testimony by Beaudry's former clients would have prompted rebuttal by the government intended to establish that the clients were willing coconspirators rather than "innocent dupes." If the government succeeded, the pattern established by the testimony would have bolstered not the defense's theory, but the government's – that is, that Sherman and Beaudry had a practice of conspiring with clients in executing fraudulent bankruptcy and tax schemes. For these reasons, we cannot say that the district court abused its discretion in determining that a trial within a trial would be required, or that a trial regarding unrelated clients involved in unrelated schemes posed a potential for confusion and delay that substantially outweighed the probative value of the evidence.

Moreover, even if the district court had abused its discretion, its error would not warrant reversal. Significantly, although defense counsel were not permitted to introduce extrinsic evidence of the alleged prior acts, they were permitted to reference the acts during cross-examination. In response to

such questioning, Beaudry admitted that he had structured fraudulent schemes for "four, five, six and maybe more" clients, but told only "one or two" that the schemes were illegal:

Q: And the others you didn't?

A: That's correct.

Through cross-examination, then, defense counsel established the precise pattern of misleading advice that the Bussells sought to establish through extrinsic evidence. Accordingly, we are not persuaded that exclusion of the extrinsic evidence more likely than not affected the verdict.

Evidence that jurors stated that they "wished [they] had heard testimony . . . from prior clients" does not change our conclusion. Rather, such evidence is, as described above, inadmissible under Rule 606(b) as testimony regarding "statement[s] occurring during the course of the jury's deliberations." Fed. R. Evid. 606(b).

D. Sentencing

Following her conviction, Letantia was sentenced to thirty-six months in custody (comprising six concurrent terms – one for each count of conviction – of thirty-six months each) and three years of supervised release. Both the government and Letantia assert errors in sentencing. For one, Letantia maintains that the application of enhancements under the Sentencing Guidelines was inconsistent with the Sixth

Amendment because they were imposed under then-mandatory guidelines on the basis of facts neither admitted by her nor proved to a jury beyond a reasonable doubt. *See United States v. Booker*, 125 S.Ct. 738, 756-57 (2005).

Because Letantia did not raise a Sixth Amendment objection below, we review the district court's application of the Sentencing Guidelines for plain error. *See Booker*, 126 S. Ct. at 769. Our review leads us to the same "dead end" reached in *Ameline:* "[I]t is not possible to reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. . . . " *Id.* at 1084. We accordingly remand to the district court to answer that question and to proceed accordingly pursuant to *Ameline.*

E. Restitution and Costs

Letantia was also ordered to pay, in addition to a special assessment and a fine, restitution totaling $2,393,527.00, for which she was jointly and severally liable with attorneys Sherman and Beaudry, and prosecution costs totaling $62,614.37. Letantia maintains that the district court erred with respect to both orders. She notes that the district court ordered restitution in an amount that, aside from an adjustment for a settled debt, was equal to intended, rather than actual, loss. *See* 18 U.S.C. § 3663. In addition, the district court ordered her to pay the

costs of prosecution in their entirety, without regard to whether they were reasonable and necessary to prosecuting the counts on which she was convicted. *See* 26 U.S.C. § 7201.

In contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*. *See United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004); *cf. United States v. Chavez*, 627 F.2d 953, 957 (9th Cir. 1980) ("The presence of the mandatory costs of prosecution provision [in 26 U.S.C. § 7203] does not, with any degree of certainty, substantially increase the threatened punishment."). We review the legality of the orders de novo. *See United States v. Gordon*, 393 F.3d 1044, 1051 (9th Cir. 2004); *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986).

Under the Victim and Witness Protection Act, the statute that governs orders of restitution for offenses committed prior to 1996, a district court's authority to order restitution is subject to several conditions. *United States v. Woodley*, 9 F.3d 774, 780 (9th Cir. 1993). Among these is the requirement that the amount of restitution be "limited by the victim's *actual* losses." *Id.* The district court, however, ordered restitution in an amount that, but for an adjustment for a settled debt, was equal to the amount of *intended* losses. We therefore vacate the order of restitution and remand to the district court to determine the actual losses caused by Letantia's fraudulent conduct – that is, to compare "what

actually happened with what would have happened if [she] had acted lawfully." *See United States v. Feldman*, 338 F.3d 212, 220-21 (3d Cir. 2003).

We must also vacate and remand the order imposing the costs of prosecution. Under 26 U.S.C. § 7201, "[t]he government may only recover costs associated with a successful prosecution." *Cf. Fowler*, 794 F.2d at 1449 (interpreting the analogous costs provision of 26 U.S.C. § 7206). As such, the government cannot assess against a defendant costs associated exclusively with the counts on which he was acquitted. *Cf. id.* Because the district court declined to allocate costs among counts (opting instead to assess them in their entirety), we cannot be certain that it excluded any costs associated exclusively with the counts on which Letantia was acquitted. We accordingly vacate and remand the order with instructions to exclude any such costs.

III. CONCLUSION

For the foregoing reasons, we affirm as to Letantia's convictions. As to her sentence, however, we remand pursuant to *Ameline*. Finally, as to the district court's orders of restitution and costs, we vacate and remand for reconsideration.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

APPENDIX C

***AMENDED* 2/27/06**

United States District Court
Central District of California

Docket No. CR-SA CR 01-56(A)-AHS

UNITED STATES OF AMERICA vs.

Defendant: Letantia Bussell
T/N: Letantia Bernadette Bussell

akas: Letantia H. Bussell; Lucille Brent; Letantia Bernadette Jankowski; "Tannie"

&

Residence: xxxxx
xxxxx, xx xxxxx

Social Security No. xxx-xx-xxxx

Mailing Address: Same

(Filed Feb. 27, 2006)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
SEPT.	09	02

COUNSEL	[x]	**WITH COUNSEL** Shirley M. Hufstedler, Rtnd. Dan Marmalefsky, Rtnd. (Name of Counsel)
PLEA	[ ]	**GUILTY**, and the court being satisfied that there is a factual basis for the plea.
	[ ]	**NOLO CONTENDRE**
	[ ]	**NOT GUILTY**
FINDING	There being a finding/verdict of	
	[x]	**GUILTY**, defendant has been convicted as charged of the offense(s) of:

Conspiracy in violation of 18 U.S.C. § 371 as charged in Count 1 of the Redacted First Superseding Indictment; False Statements, False Oaths and Concealed Assets in Bankruptcy, and Aiding and Abetting and Causing an Act to Be Done, in violation of 18 U.S.C. § 152(1) as charged in Counts 2-3 and 5-6 of the Redacted First Superseding Indictment; Attempt to Evade or Defeat Tax, and Aiding and Abetting and Causing an Act To Be Done, in violation of 26 U.S.C. § 7201 as charged in Count 12 of the Redacted First Superseding Indictment.

JUDGMENT AND PROB/ COMMITMENT ORDER	The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

Thirty-six (36) Months. This term consists of thirty-six (36) months on each of Counts 1 through 3, Counts 5 and 6, and Count 12 of the Redacted First Superseding Indictment, to be served concurrently.

IT IS ORDERED that the defendant shall pay to the United States a special assessment of $300.00, which is due immediately.

IT IS FURTHER ORDERED that the defendant shall pay restitution in the total amount of ***$2,284,172.87***, pursuant to 18 USC § 3663A. ***Any compensation that a victim receives from other sources, including forfeited funds and funds resulting from foreclosure on any relevant IRS liens, shall be counted toward satisfaction of the amount owed in restitution.***

JUDGMENT AND PROBATION/COMMITMENT ORDER

Victim	Amount
AMA Gold Card Chase Bankcard Services Fraud Investigations, Ken Couture P.O. Box 29073 Phoenix, AZ 85038-8664	$ 7,341.82
Bank of Beverly Hills FDIC Kathy Coleman 1910 Pacific Avenue Dallas, TX 75201	$ 787,500.00
Bank One Visa c/o Nina Williams P.O. Box 15705 Wilmington, DE 19801	$ 4,945.94
Cappello, Foley & Bezek c/o Stuart Sherman 831 State Street Santa Barbara, CA 93101	$ 89,520.83
Chevy Chase Bank FSB c/o Nina Williams P.O. Box 15705 Wilmington, DE 19801	$ 6,011.63
Citibank/AT&T P.O. Box 6305 The Lakes, NV 88901	$ 29,334.00

First Card c/o Nina Williams P.O. Box 15706 Wilmington, DE 19801	$ 4,633.00
First Union Visa P.O. Box 15971 Wilmington, DE 19850-5971	$ 2,161.81
Franchise Tax Board Legal Affairs Bureau P.O. Box 1720 Rancho Cordova, CA 95741-1720	$ 141,540.46
GM Gold Mastercard P.O. Box 60119 City of Industry, CA 91716-0119	$ 8,415.57
Household Bank Visa Household Credit Services 841 Seahawk Circle Virginia Beach, VA 23452	$ 7,259.21
Internal Revenue Service SPF: STOP 6022 300 N. Los Angeles Street Los Angeles, CA 90012	$ 1,067,621.90
Marine Midland Bank HSBC Bank USA Correspondence Unit P.O. Box 9 Buffalo, NY 14240	$ 27,734.39
MBNA America P.O. Box 15971 Wilmington, DE 19850-5971	$ 83,049.98

Signet Bank Card Capital One Payment Processing P.O. Box 26030 Richmond, VA 23260	$	4,470.43
Visa IZB Citybank USA P.O. Box 8034 South Hackensack, NJ 07606-8034	$	7,373.38
Wells Fargo Primeline Legal Process, John Weber P.O. Box 4063 Concord, CA 94524	$	14,612.74

IT IS FURTHER ORDERED that restitution shall be paid in full within ninety (90) days of sentencing.

IT IS FURTHER ORDERED that pursuant to 26 U.S.C. § 7201, the defendant shall pay the costs of prosecution as sought by the government, in the amount of $55,626.09, to be paid in full within ninety (90) days of sentencing.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a total fine of $50,000.00 which shall bear interest as provided by law. The fine shall be paid in full within ninety (90) days of sentencing.

IT IS FURTHER ORDERED that the defendant shall comply with General Order 01-05.

IT IS FURTHER ORDERED that defendant, and Jeffrey Adam Sherman and Robert Beaudry, her

convicted co-participants, will be held jointly and severally liable for the total amount of restitution.

IT IS FURTHER ORDERED that upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years. This term consists of three (3) years on all counts of conviction, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U.S. Probation Office, and General Orers 318 and 01-05;

2. The defendant shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing, as instructed by the Probation Officer. The defendant shall abstain from using illicit drugs, using alcohol and abusing prescription medications during the period of supervision;

3. At the discretion of the Probation Officer, the defendant shall participate in a psychological/ psychiatric counseling or treatment program, as approved and directed by the Probation Officer;

4. As directed by the Probation Officer, the defendant shall pay all or part of the costs of treating any drug and/or alcohol dependency and any psychiatric disorder of the defendant to the aftercare contractor during the period of community supervision, pursuant to 18 USC § 3672. The defendant shall provide payment and proof of payment as directed by the Probation Officer;

5. During the period of community supervision the defendant shall pay the costs of supervision, the special assessment, fine and restitution in accordance with this judgment;

6. The defendant shall truthfully and timely file and pay taxes owed for the years of conviction; and shall truthfully and timely file and pay taxes during the period of community supervision. Further, the defendant shall show proof to the Probation Officer of compliance with this order; and

7. The defendant shall notify the California State Medical Board of her conviction no later than 30 days after sentencing. The defendant shall provide proof of such notification to the Probation Officer.

IT IS FURTHER ORDERED that the defendant surrender herself to the institution designated by the Bureau of Prisons on or before 12 noon, October 24, 2002. In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at the United States Courthouse, 411 West Fourth Street, Room 4170, Santa Ana, California 92701-4516.

IT IS FURTHER ORDERED that the bond is exonerated upon surrender and not before, with all pretrial services conditions to remain in effect.

***IT IS RECOMMENDED that the Bureau of Prisons shall designate confinement of defendant to Federal Prison Camp in Dublin, California, and that defendant be permitted to enroll in the**

comprehensive Residential Drug Abuse Program (RDAP) at FPC Dublin. Defendant suffers from Diabetes I and information concerning her treatment needs is available.*

IT IS FURTHER ORDERED that all remaining counts/underlying indictment be dismissed as to this defendant.

Defendant is informed of right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

☐ **This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.**

Signed by: Chief U.S. District Judge

/s/ AliceMarie H. Stotler
ALICEMARIE H. STOTLER

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/ Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

[SEAL] By /s/ Ellen N. Matheson [SEAL]
Ellen N. Matheson, Deputy Clerk

Date/Filed Feb 27 2006

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CRIMINAL MINUTES – GENERAL

Case No.: SA CR 01-56(A) AHS Date: February 3, 2006

Title: United States of America v. Letantia Bussell

==========

(Filed Feb. 3, 2006)

PRESENT: HON. ALICEMARIE H. STOTLER, CHIEF U.S. DISTRICT JUDGE (IN CHAMBERS)

Ellen Matheson	Not Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT: None

PROCEEDINGS: ORDER DECIDING NOT TO RESENTENCE DEFENDANT; ORDER ON RESTITUTION; ORDER ON COSTS; AND, ORDER DENYING RECONVEYANCE OF TRUST DEEDS AFTER REMAND BY COURT OF APPEALS

I. Background

On January 30, 2006, the Court held a hearing in the above-entitled matter regarding (1) post-remand

proceedings after judgment by the Court of Appeals for the Ninth Circuit and (2) defendant's application for reconveyance of trust deeds. At the hearing, the Court issued a Tentative Ruling to counsel. The Court hereby adopts as its Order the Tentative Ruling of January 30, 2006, with two changes set in Paragraphs II and III below.

II. Costs of Prosecution

The Court finds that certain costs are associated exclusively with counts on which defendant was acquitted, *see United States v. Fowler,* 794 F.2d 1446, 1449 (9th Cir. 1986), or not shown to be necessary for conviction on Count 12, the tax evasion count. Excluded are costs associated with (1) the grand jury transcripts, (2) pretrial and post-trial transcripts, (3) and witnesses Dan Gleason, Irene Abbey, David Lingenbrink, and Deborah Barrett. The Court therefore orders defendant to pay costs of prosecution in the amount of $55,626.09 and orders the Judgment to so reflect.

III. Restitution

The Court's Tentative Ruling contained a calculation error in the amount of restitution. The actually discharged debt, the amount of actual loss, less the $9,354.22 that co-defendant Jeffrey Sherman has already paid, is $2,274,548.65, not $2,274,550.65, as stated in the Tentative Ruling. Therefore, defendant is ordered to pay as restitution the sum of

$2,274,548.65 on the same terms and conditions as in the original Judgment and the Judgment shall reflect the reduced sum.

IV. Defendant Shall Not be Resentenced; Trust Deeds Remain with Court; and Defendant's Bond on Appeal Stands

In accordance with the Tentative Ruling, the Court decides not to resentence defendant and denies reconveyance of the trust deeds previously posted for securing a stay on appeal. The need for the security provided by the trust deeds remains in light of defendant's expected second appeal, discussed below, or until defendant no longer seeks a stay of her financial obligations under the Judgment.

The Court denied the government's speaking motion to remand defendant to commence her custodial sentence. At the hearing, however, defense counsel represented that defendant would make a timely appeal of the rulings on post-remand proceedings, assuming the Court's rulings remained as set out in the Tentative Ruling, which, for the most part, they do. Because the district court originally denied bond pending appeal, but the Court of Appeals granted it, the Court assumes that the Ninth Circuit's order for bond pending appeal stands.

The clerk shall serve this order on counsel for all parties in this action.

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

THE HONORABLE ALICEMARIE H. STOTLER, CHIEF JUDGE, PRESIDING

TENTATIVE RULING ON POST-REMAND PROCEEDINGS

January 30, 2006 Calendar No. 1

CASE: United States of America v. Letantia Bussell
SA CR 01-56(A) AHS

PROCEEDING: (1) Post-Remand Proceedings after Judgment by U.S. Court of Appeals, Ninth Circuit; and (2) Hearing on Defendant's Application for Reconveyance of Trust Deeds

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1. Procedural Background

On July 12, 2005, the Ninth Circuit affirmed defendant Letantia Bussell's convictions, remanded the case for limited proceedings pursuant to *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005) (en banc) (*"Ameline III"*), and reversed and remanded the Court's orders of restitution and costs.

Specifically, the Ninth Circuit granted a limited remand on defendant's sentence because it was "'not possible to reliably determine from the record whether the sentence imposed would have been

materially different had the district court known the Guidelines were advisory.'" *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005) (quoting *Ameline III*, 409 F.3d at 1084). With respect to the restitution order, the Ninth Circuit vacated the order and remanded for the Court "to determine the actual losses caused by [defendant's] fraudulent conduct – that is, to compare 'what actually happened with what would have happened if [she] had acted lawfully.'" *Bussell*, 414 F.3d at 1061 (quoting *United States v. Feldman*, 338 F.3d 212, 220-21 (3d Cir. 2003). With respect to the order imposing prosecution costs, the Ninth Circuit vacated the order and remanded with instructions to exclude any costs associated exclusively with the counts on which defendant was acquitted. *Bussell*, 414 F.3d at 1061.

On November 21, 2005, the Court held a status conference, at which time the Court set a briefing schedule for further proceedings. On December 19, 2005, defendant filed her Memorandum "Concerning Issues Remanded by the Ninth Circuit." and supporting exhibits, as well as a supplemental memorandum in support of defendant's application for reconveyance of trust deeds that was previously lodged on November 14, 2005.[1] The government also filed its "Position Re: Sentencing on Remand from the U.S. Court of Appeals for the Ninth Circuit" and

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[1] The government had filed opposition to this application on November 15, 2005.

supporting exhibits on December 19, 2005. On January 17, 2006, defendant filed her Reply Memorandum "Concerning Issues Remanded by the Ninth Circuit" and supporting exhibits. The government again filed on the same day its "Response to Defendant Letantia Bussell's Memorandum Concerning Issues Remanded by the U.S. Court of Appeals for the Ninth Circuit" and supporting exhibits. On January 27, 2006, the government filed information regarding co-defendant Jeffrey Sherman's payment of restitution.

2. Prior Sentencing Proceedings

On September 12, 2002, the Court sentenced defendant to 36 months imprisonment, imposed restitution in the amount of $2,393,527, ordered payment of a $50,000 fine, and imposed prosecution costs in the amount of $62,614.37.

3. Summary of Parties' Contentions

a. Defendant's Position:

1. *Ameline III* Remand

Defendant contends the Court should vacate the prior sentence and set the matter for resentencing because defendant's sentence would have differed materially had the Guidelines been advisory at the time of the original sentence. Post-*Booker*, the Court should begin by correctly calculating the Guidelines offense level. The Sixth Amendment jury trial right

and the first portion of the Court's opinion in *Booker* require that the Court's calculation be limited to facts found to be true by the jury beyond a reasonable doubt. The Court should also consider the factors enumerated in 18 U.S.C. § 3553(a). In addition, the Court is free to consider sentences of time in a halfway house, on home detention, or through community service, and the Court may freely consider the background information, character, or conduct of defendant pursuant to 18 U.S.C. § 3661.

Resentencing is warranted because the Court's calculation of the offense level was erroneous in two respects. First, the Court misapplied the Guidelines when it calculated loss based on the full amount of debts scheduled, or intended loss, rather than the much lower net value of assets concealed, or actual loss. While the Ninth Circuit did not directly address the arguments raised by defendant concerning sentencing, it quoted with approval from *Feldman*, 338 F.3d at 220-21, on which defendant relied to establish that the Court erred in failing to value individual assets. At a new sentencing hearing, the Court should identify the relevant assets and calculate their value to creditors. The only assets to be valued are the bankruptcy estate's "beneficial ownership interest" in two bank accounts in the names of the medical management corporations associated with defendant's dermatology practice. Second, the Court erred when it failed to determine what value *defendant* placed on particular assets, which it should have done if was applying an

intended loss measure for calculating loss. *See, e.g., United States v. Fearman,* 297 F.3d 660, 661 (7th Cir. 2002).

Applying the post-*Booker* methodology, defendant's sentence would be materially different not only because her offense level would differ, but because numerous personal characteristics warrant a lesser sentence. The Court should impose a sentence that provides defendant with medical care in the most effective manner, 18 U.S.C. § 3553(a)(2)(D), and defendant suffers from several ailments including diabetes and severe skeletal and neurological ailments. Defendant's age is such that she presents a reduced risk of recidivism. Incarcerating defendant would adversely affect her children, elderly parents, employees at her dermatology practice, and her patients. Defendant has also suffered significant collateral consequences such as IRS levies and forfeiture of property held in trust for her children. In addition, evidence before the Court supports a finding that defendant's conduct in this case was aberrant behavior in an otherwise law-abiding life. Defendant has behaved in an exemplary manner while she has been under electronic monitoring for four years now.

Finally, the sentencing disparity between defendant and Robert Beaudry, who played a central role in the conspiracy of which defendant was convicted, warrants a materially different sentence. This past summer the Court sentenced Mr. Beaudry to three months imprisonment followed by three months home detention.

2. Restitution

Defendant asserts that she does not owe restitution. In light of the Ninth Circuit's ruling that the Court should impose restitution in the amount of actual losses caused by defendant, the Court should proceed in the following manner: (1) the Court must determine the offenses of which defendant was convicted that caused the losses, which offenses defendant contends were the concealing of two specific assets; (2) the Court should determine the actual losses sustained by creditors of the Bussells as a result of concealing these two assets; (3) the Court should determine to what extent particular creditors would have been entitled to any assets of the Bussells; and (4) the Court should credit against any restitution award amounts collected to date.

Defendant was charged with concealment of three assets, but was only convicted of concealment of two: beneficial ownership interest in two bank accounts in the names of the medical management corporations associated with defendant's dermatology practice. The actual loss sustained by creditors as a result of concealment of these two assets was no more than $85,000. Defendant previously demonstrated this at her original sentencing and on appeal. To summarize defendant's position, the value of defendant's interest in the bank accounts should not be simply the amount in the accounts, but the amount in the accounts less taxes, interest and penalties, administrative expenses of the trustee, and a "wild card" deduction pursuant to section 703.140 of

the California Civil Procedure Code, because this is what would have been available to creditors.

Only the IRS would have been entitled to payment of the two bank account assets. According to the Ninth Circuit, the Court is to determine what would have happened had defendant acted lawfully, i.e., listed the bank accounts as assets. All net assets of the estate would have been applied first to the IRS debt, which totaled over $1 million. *See In re Johnston,* 21 F.3d 323, 330-31 (9th Cir. 1994). Because the net assets available were no more than $85,000, no other creditor but the IRS would have received funds.

The Court should credit against the restitution award of $85,000 the amounts that the IRS, the only creditor entitled to receive funds, has collected through executing on various liens. *See* Victim Witness & Protection Act, 18 U.S.C. § 3663(e)(1). Because the IRS debt has been satisfied in full, the Court shall not impose restitution under the Victim Witness and Protection Act. *Id.* To the extent the Court disagrees with the calculation of funds that would have been available to creditors, however, the Court should take into account the funds received as a result of four forfeiture judgments the government has secured against the Bussells and the extent to which the government has collected any restitution against co-defendant Jeffrey Sherman and Mr. Beaudry, who were held jointly and severally liable with defendant for the restitution debt.

3. Costs of Prosecution

Defendant does not object to $25,681.96 of the costs of prosecution imposed by the Court. Defendant renews her objections to the balance of the costs made at the original sentencing and on appeal. Defendant identifies 17 witnesses whose testimony did not concern Count Twelve, the tax evasion count, and thus, the costs associated with them should be excluded. In addition, unsubstantiated travel costs for one government employee witness and the costs for transcribing the proceedings that were not reasonably necessary to Count Twelve should be excluded.

b. Government's Position:

1. *Ameline III* Remand

The government contends that defendant's sentence would not have differed materially had the Court known the Guidelines were advisory. The sentence the Court imposed was presumptively reasonable because it was determined in accordance with the now-advisory Guidelines. *See United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005). Even if the Court erred in its loss calculation under U.S.S.G. § 2F1.1,[2] which the government does not concede, the Court should still view the 36-month sentence as reasonable because defendant was also convicted of

[1] Defendant was sentenced using the November 1, 1994 version of the Guidelines.

tax evasion. Applying § 2T1.1 to determine the offense level for tax evasion, and applying adjustments for use of sophisticated means and obstruction of justice, defendant would have an offense level of 21. This results in a sentencing range of 37-46 months, which is still higher than the sentence defendant received.

Additionally, defendant's sentence took into account factors set forth in § 3553(a). In connection with defendant's motion for a downward departure, the Court considered the nature and circumstances of defendant's offenses and extensive evidence and argument regarding defendant's history and characteristics. In addition, the Court considered defendant's characteristics in connection with defendant's request for a minor role adjustment, heard defendant's lengthy allocution, and read the numerous letters submitted on defendant's behalf. As evidenced by the Court's comments at the sentencing hearing, the Court considered the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, and afford deterrence. Finally, the Court considered the need to avoid unwarranted sentencing disparities when it considered the Guidelines and defendant's request for downward departure based on the sentence defendant anticipated the Court would impose on her co-conspirators. It is notable here that the Court granted defendant's request for downward departure and that it gave defendant a mid-range

sentence. The Court clearly used its discretion and tailored the sentence to defendant.

Further, the sentence is reasonable based on other § 3553(a) factors not articulated by the Court. Defendant's offense was egregious, she was motivated by nothing more than greed, and she lied about her offense on the stand and minimized her role at sentencing.

2. Restitution

The Court should order restitution in the amount of $2,293,527.09, the amount of the actually discharged debt, because, absent defendant's fraud, she had ample resources to repay her debts and was not eligible for a discharge in bankruptcy. Defendant was convicted of conspiracy to commit bankruptcy fraud, and actual loss is not restricted to the loss underlying particular substantive counts of conviction. Rather, the correct measure of loss is the amount of damages caused throughout an entire scheme. *United States v. Kubick,* 205 F.3d 1117, 1128-29 (9th Cir. 1999). The government's burden in establishing this amount of loss is preponderance of the evidence. 18 U.S.C. § 3664(e).

As the PSR and trial record showed, defendant was accountable for $3,057,927.09 in intended losses, reflecting the amount of debt she sought to discharge in her fraudulent bankruptcy filing; defendant succeeded in actually discharging $2,293,527.09. Defendant engaged in an ongoing conspiracy for three

years with Mr. Sherman and Mr. Beaudry to conceal her substantial income and assets and to finally discharge her debt. Setting aside the assets defendant concealed, the evidence at trial showed that, based on her income alone, defendant had the resources to pay her debt. In determining "what would have happened had defendant acted lawfully," it is fair to assume defendant would not have followed this illegal plan outlined by co-conspirators Mr. Sherman and Mr. Beaudry, and she would not have succeeded in avoiding paying her creditors.

Alternatively, assuming the Court were to consider only what would have happened had defendant made a full and truthful disclosure of her financial affairs, the bankruptcy court would likely have dismissed defendant's Chapter 7 case under 11 U.S.C. § 707(b) for "substantial abuse." Thus, it would remain clear that defendant was not eligible for a discharge in bankruptcy. This hypothetical state of affairs presumes that defendant started acting lawfully on the eve of filing her bankruptcy petition, but ignores the three years prior in which defendant engaged in fraudulent conduct.

3. Costs of Prosecution

All of the costs imposed by the Court, $62,614.37, were reasonable and associated with the tax evasion prosecution, and none of the costs were associated exclusively with counts on which defendant was acquitted. Defendant's tax evasion involved the

affirmative acts of concealing assets and making false statements in bankruptcy. While some of the witnesses for which costs were assessed testified on other counts, all of the witnesses would have been called even if only Count Twelve were charged.

c. Defendant's Reply

1. *Ameline III* Remand

The government's claim that the sentence was presumptively reasonable is not the standard the Court should apply on the remand pursuant to *Ameline III*. Instead, the Court should determine whether defendant's sentence was sufficient, but not greater than necessary, to comply with the purposes set forth in § 3553(a)(2). The Court still has to correctly calculate the Guideline range, which the Court did not do in this case, as detailed in defendant's memorandum. The government's alternative Guidelines calculation pursuant to § 2T1.1 is unsupported by the record and applicable law, and is clearly inaccurate. Further, the Court did not base defendant's sentence on factors it may now consider under 18 U.S.C. § 3553(a). Indeed, the government argued against the Court considering many of the factors because the Guidelines restricted consideration of the factors at the time. Finally, considering the § 3553(a) factors now, the Court's sentence is not reasonable.

2. Restitution

The government incorrectly seeks an order of restitution based on conduct and offenses with which defendant was neither charged nor convicted. The net value of the assets defendant was convicted of concealing was $85,000, as set forth in defendant's memorandum. Again, the IRS was the only creditor that was entitled to receive the net value of the assets, and because it has already been paid, defendant should owe no restitution.

The net values of the assets other than the two concealed bank accounts that the government describes in its position are irrelevant because defendant was not charged with or convicted of concealing these assets. Without waiving this argument, defendant notes that the government incorrectly values a number of these assets; in reality, the net value of the assets would have been a small fraction of what the government claims. Further, the Court should disregard the government's entire discussion on dismissal for bankruptcy abuse as irrelevant and inaccurate. The Bussells were not charged with a sham bankruptcy; in light of their substantial existing and potential debts at the time of filing, the bankruptcy petition was proper.

3. Costs of Prosecution

The government recycles the arguments made at the original sentencing and on appeal, and which the Ninth Circuit necessarily rejected when it vacated

and remanded the costs order. The government is incorrect that the testimony of all its witnesses and the transcribing of all the proceedings were necessary to obtain the conviction on Count Twelve.

d. Government's Response

1. *Ameline III* Remand

Defendant's claim that resentencing is warranted to correct errors in the Guidelines calculations is without merit. Limited remand proceedings under *Ameline III* are designed only to determine whether defendant's sentence would have differed materially had the Guidelines been advisory; the purpose is not permit a second bite at the sentencing apple. Only if the Court answers the limited remand question affirmatively is the Court required to reopen Guidelines calculations. Defendant's Fifth Amendment due process claim also is without merit because *Booker* did not prohibit courts from engaging in judicial fact-finding by a preponderance of the evidence at the sentencing phase. Finally, defendant's claim that the § 3553(a) factors would have resulted in a materially different sentence is without merit. The Court considered these factors in exercising its discretion to depart downward and to impose a sentence in the mid-range.

2. Restitution

Defendant's claim that she owes no restitution is premised on a misstatement of the law. It is

well-settled Ninth Circuit law that where a defendant has been convicted of an offense that involves a scheme, conspiracy, or pattern of criminal activity as an element, a court's restitution order may encompass losses resulting from any acts that were part of the scheme or conspiracy. 18 U.S.C. § 3663(a)(2); *United States v. Kubick,* 205 F.3d 1117, 1128 (9th Cir. 1999). Defendant also misrepresents the scope of the conspiracy with which she was charged and convicted, which goes beyond the two bank accounts she was convicted of concealing. This is demonstrated by the plain language of the conspiracy count of the Indictment and the government's bill of particulars. Moreover, defendant's participation in the full scope of the conspiracy, involving the concealment of the many assets described in the government's position and response, need only be shown by a preponderance of the evidence, and the government has done this.

Defendant's effort to minimize the harm to creditors ignores the fact that, but for her fraud, she would not have been eligible for discharge of any of her debts. Finally, defendant is not entitled to credit for funds collected or received by victims. While the IRS executed levies to satisfy her obligation to it, defendant is contesting the IRS's right to maintain possession of these proceeds in the United States Tax Court. She should not receive credit for these proceeds, nor should she receive credit for four forfeiture actions the government successfully prosecuted. None of the proceeds from these actions

have gone to victims. Instead, the proceeds have gone to the Department of Justice Forfeiture Fund and the Department of Treasury Forfeiture Fund.

3. Costs of Prosecution

As explained in the government's position, Count Twelve charged that defendant committed tax evasion through numerous affirmative acts, including establishing nominee entities, making false statements or oaths, and concealing assets during the pendency of bankruptcy. All of the witnesses whose costs were assessed were necessary to prove Count Twelve. None of these costs are associated exclusively with acquitted counts.

e. Reconveyance of Trust Deeds Previously Recorded Under Fed. R. Crim. P. 38 to Stay Collection of Costs and Restitution

1. Defendant's Application

The Court stayed collection of the fine, costs of prosecution, and restitution in this case on condition that defendant post security. Defendant recorded two-trust deeds naming the Clerk of the Court as beneficiary in order to satisfy this condition. One trust deed stayed collection of the fine and costs award, and the other stayed collection of an uncollected portion of restitution.

Federal Rule Criminal Procedure 38 permits a court to stay payment of costs and restitution on

appropriate terms pending appeal. At the time defendant lodged this application, the Court's restitution and costs orders were no longer in effect, collection did not need to be stayed, and therefore, the Court should have ordered the clerk to reconvey the trust deeds. The portion of the trust deeds representing the $50,000 fine would have been replaced by $50,000 that defendant would have deposited.

2. Government's Opposition

The government contended that the Court should have taken defendant's request for reconveyance of deeds under submission pending resolution of whether the original orders imposing costs and restitution would stand. In the event that the Court determined they would stand, the trust deeds would already be in place if defendant appealed the sentence again. If the Court reduced the orders, it could order reconveyance of the amount necessary to comply with the modified orders.

Alternatively, if the Court granted defendant's request to reconvey the trust deeds, the government requested that the Court increase defendant's bail.

3. Court's Ruling at November 21, 2005 Status Conference

The Court ruled that it would hear defendant's application for reconveyance of trust deeds at the January 30, 2006 hearing.

4. Defendant's Supplemental Memorandum

Rule 38 provides that courts may require security on amounts owed while a case is on appeal. The rule applies only when the order of restitution, fine, or costs is in effect. The Ninth Circuit's vacatur of the Court's orders here renders them inoperative. Consequently, the trust deeds should be reconveyed.

In addition, California law provides that a trust deed is incidental to the obligation secured, and is valid and enforceable only to the extent that the underlying obligation exists. Thus, California law also requires that the trust deeds be reconveyed.

4. Court's Ruling

a. *Ameline III* Remand

As a preliminary matter, Defendant's Fifth Amendment due process/Sixth Amendment argument is unavailing. In his *Booker* majority opinion, Justice Stevens recognized that if the Guidelines "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Booker*, 125 S. Ct. at 750. Justice Stevens further noted "everyone agrees that the constitutional issues presented by [*Booker*] could have been avoided entirely" if the Guidelines were not binding on district judges. *Id.* Accordingly, a "defendant has no right to a jury determination of the

facts that the judge deems relevant" when the judge sentences in an advisory range system, *id.*, which is what remains after Justice Breyer severed the provisions of the Guidelines that made them mandatory. *Id.* at 757-58.

The Ninth Circuit clarified any ambiguities, if any existed, with respect to a sentencing judge's authority to consider facts beyond those found by a jury. In *Ameline III,* the court held that it was crucial to appreciate

> the distinction drawn by the Supreme Court [in *Booker*] ... Standing alone, judicial consideration of facts and circumstances beyond those found by a jury or admitted by the defendant does not violate the Sixth Amendment right to jury trial. A constitutional infirmity arises only when extra-verdict findings are made in a mandatory guidelines system.

Ameline III, 409 F.3d at 1077-78. Thus, post-*Booker*, the Court may find facts that are the basis for an enhanced sentence in consulting the advisory Guidelines. In this case, the Court could and did find the facts that were necessary for the sentencing enhancements based on loss and obstruction of justice.

After reading and considering the positions of the parties, after reviewing the prior proceedings, after taking into account the advisory Guidelines and the statutory factors of § 3553(a), the Court concludes

that defendant's sentence would not have differed materially had the Guidelines been advisory at the time of the original sentencing, 36 months imprisonment being a just and reasonable sentence in this case. The Court decides not to resentence defendant Bussell.

The limited remand directed by *Ameline III* does not require that the Court reconsider or recalculate defendant's offense level and Guidelines range (unless a new resentencing is ordered). *See Ameline III*, 409 F.3d at 1085-86.

b. Restitution

The Court finds that restitution in the amount of $2,283,902.87, the actually discharged debt, less the $9,354.22 already paid by co-defendant Mr. Sherman ($2,274,550.65) represents the actual losses defendant inflicted on victims, that is, the losses to victims that would have been avoided had defendant acted lawfully. *See Feldman*, 338 F.3d at 221. The Victim and Witness Protection Act allows restitution for persons harmed as a result of defendant's criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity. 18 U.S.C. § 3663(a)(2); *see United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003) (noting that courts may order restitution for losses to persons harmed in the course of a scheme by defendant, even on related conduct for which the defendant was not convicted).

The government bears the burden of demonstrating the amount of loss by a preponderance of the evidence. 18 U.S.C. § 3664(e); *United States v. Lawrence,* 189 F.3d 838, 846 (9th Cir. 1999). Here, the government has demonstrated by a preponderance of the evidence that defendant caused actual losses in the amount of $2,293,257.09 as a result of her conspiracy conviction in Count One. Had defendant acted lawfully, she would not have conspired in three years of pre-bankruptcy tax planning so that she and her spouse could conceal substantial income and assets to obtain a fraudulent discharge of their debts.

c. Costs of Prosecution

Costs of prosecution totaling $62,614.37 represent the amount attributable to costs used to prove Count Twelve. Put differently, none of this amount is attributable to costs associated *exclusively* with the counts on which defendant was acquitted. *See Fowler,* 794 F.2d at 1449. The government correctly asserts that all of its witnesses were relevant to proving tax evasion because the evasion count, Count Twelve, alleged that defendant evaded tax debt by engaging in the conduct that was the substance of the other counts. Thus, these witnesses would have been called even if only Count Twelve was charged, and the proceedings would have been recorded and transcribed for the purpose of just Count Twelve.

Defendant's objection to the higher travel costs for witness Jane Liang is not well-taken, given that Ms. Liang was a summary witness whose presence at the trial was required for an extended period of time.

d. Reconveyance of Trust Deeds

In light of the Court's imposition of restitution and costs of prosecution, the Court denies defendant's application for reconveyance of the trust deeds at this time.

5. Defendant is hereby advised that an appeal of the Court's decision announced this date may be taken. For an appeal to be effective, defendant must file a Notice of Appeal with the Clerk of this Court not later than ten days from today's date. Failure to file a Notice of Appeal will result in there being no appellate review of the Court's judgment.

Under *Ameline III,* a party wishing to appeal the order [decision not to resentence] may file a notice of appeal as provided in Fed. R. App. P. 4(b). A new appeal taken after the filing of the district court's order will be subject to the usual procedure pertaining to "comeback" cases, as provided in General Order 3.7, *General Orders of the Ninth Circuit Court of Appeals* (2005).

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

THE HONORABLE ALICEMARIE H. STOTLER, JUDGE, PRESIDING

TENTATIVE RULING ON SENTENCING

September 9, 2002 Calendar No. 18

(Filed Sep. 12, 2002)

CASE: **United States of America v. Letantia Bussell**
SA CR 01-56(A) AHS

PROCEEDING: Sentencing Under Guidelines After Verdict

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1. Procedural Background

On February 6, 2002, defendant Letantia Bussell was found guilty of the following offenses (all references are to the Redacted First Superseding Indictment): one count of violating 18 U.S.C. § 371 (conspiracy) (Count 1); two counts of violating 18 U.S.C. § 152(1) (concealing assets in bankruptcy) (Counts 2 and 3); two counts of violating 18 U.S.C. § 152(3) (false declaration and statement as to material matters) (Counts 5 and 6); and one count of

violating 26 U.S.C. § 7201 and 18 U.S.C. § 2 (evading payment of income tax) (Count 12).[1]

On August 5, 2002, the Probation Office disclosed the Presentence Investigation Report ("PSR"). The Probation Office disclosed its Addendum to the PSR on August 30,2002.

Defendant filed her position on August 19, 2002; the government filed a partial concurrence in the findings of the PSR on August 19, 2002. The defendant filed her response to the government's partial concurrence on August 26, 2002; the government filed its exhibits in support of its combined response to defendant's position on August 26, 2002. The government's response to defendant's specific objections to the PSR was filed on August 27, 2002 and the government's combined position regarding sentencing factors and response to defendant's position was filed on August 28, 2002. On August 29, 2002, the government filed its memorandum re: costs of prosecution on August 29, 2002, and filed its reply to defendant's response to government's partial concurrence on September 3, 2002. Defendant filed her objections to particular

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[1] Defendant was acquitted of the following: one count of violating 18 U.S.C. § 152(1) (concealing assets in bankruptcy) (Count 4); one count of violating 18 U.S.C. § 152(2) (making a false oath or account in bankruptcy proceedings) (Count 11); and one count of violating 26 U.S.C. § 7201 and 18 U.S.C. § 2 (evading taxes and causing fraudulent joint income tax to be returned) (Count 17).

costs claimed by the government on September 5, 2002; her response to the addendum to the PSR on September 5, 2002; and her response to the government's combined position regarding sentencing on September 6, 2002.

Defendant has had 35 days to review the PSR, as required by Federal Rule of Criminal Procedure 32(b)(6)(A).

2. Objections to the Factual Statements in the PSR

a. Contested Matters not Affecting Sentencing

Pursuant to Federal Rule of Criminal Procedure 32(c)(1), the Court need not make findings as to controverted factual statements if they will not affect sentencing or will not be taken into account.

i. By the Defendant

Defendant objects to PSR ¶¶ 6-8, 10, and 18 on grammatical, structural, and linguistic grounds.

Defendant objects to PSR ¶¶ 13-14 and 16-17 on the grounds that defendant was not charged with the therein referenced counts.

Defendant objects to ¶¶ 115, 119, 127, 158 regarding family history, John Bussell's accident, the Probation Officer's visit to defendant's home, and a

description of the financial statement given by defendant to the Probation Officer.

ii. By the Government

The government objects that ¶ 61 inaccurately states that government attorneys were required to respond to the complaint sent to the State Bar.

Court's Ruling

The Court makes no ruling on the parties' objections to ¶¶ 6-8, 10, 18, 13-14, 16-17, 61, 115, 119, 127 and 158 as the matter contained therein will not affect sentencing nor be taken into account.

b. Contested Matters Affecting Sentencing

i. By Defendant

Defendant objects to various paragraphs of the PSR as reciting inaccurate facts or reciting inaccurately or without support the evidence at trial. Defendant objects that ¶¶ 45-47 inaccurately attributes conduct to her. Defendant asserts that her role was minor and that the offense conduct was attributable to her lawyers, Beaudry and Sherman, and to her husband, J. Bussell. Defendant objects that ¶ 48 overstates the impact of the debts discharged through bankruptcy, and, in particular, that that Provident did not have its claim fully discharged through bankruptcy but realized substantial value in later proceedings. Defendant

objects that ¶¶ 49-64 erroneously assert that she committed obstruction of justice. Defendant objects to ¶¶158-203 and ¶¶ 216-218 regarding the assessment of her financial condition and ability to pay a fine or restitution.

ii. By the Government

Government substantially agrees with the facts set out in the PSR ¶¶ 1-64 and makes counter arguments to defendant's objections.

Court's Rulings on Objections

The Court overrules defendant's objections, except as to ¶¶ 40 and 48. The PSR recites the evidence and other factual matters substantially accurately. Even where defendant L. Bussell objects that assets were not directly controlled by her, or were even unknown to her, there was sufficient evidence presented at trial to indicate her substantial involvement in the pattern of events. Defendant correctly points out that Provident's claim was not extinguished by the bankruptcy discharge, and hence ¶¶ 40 and 48 should not refer to an insurance company.

3. Parties' Positions On Application of Sentencing Guidelines

In the PSR, the Probation Office recommended a total adjusted offense level of 25. Defendant has

asserted an adjusted offense level of 14. The government has asserted an adjusted offense level of 29.

The Parties Agree. The parties agree on the following points: (1) that defendant has zero criminal history points establishing a criminal history category of I; (2) that the base offense level is 6 pursuant to U.S.S.G. § 2F1.1[2]; that a 2-level increase applies under U.S.S.G. § 2F1.1(b)(2) because the offense (A) involved more than minimal planning or (B) involved a scheme to defraud more than one victim; and (3) that the offense level is increased by 2 levels because the conviction included a violation of the judicial process under § 2F1.1(b)(3)(B).

The Parties Disagree. The PSR increases the offense level by 13 levels under U.S.S.G. § 2F1.1(b)(1)(N), because the loss amount was greater than $2.5 million but not greater than $5 million. The government agrees. Defendant disagrees and argues that the loss was less than $120,000 and the offense level should be increased 6 levels under U.S.S.G. § 2F1.1.

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[2] The references to U.S.S.G. § 2F1.1 refers [sic] to the 1994 Sentencing Guidelines. § 2F1.1 was eliminated and incorporated into § 2B1.1 of the current Guidelines. The changes also provide for a higher loss increase. To avoid *ex post facto* issues, the PSR and parties use the 1994 § 2F1.1 to calculate the adjustments, and that section is applied herein.

The PSR increases the offense level by 2 levels for obstruction of justice under U.S.S.G. § 3C1.1. The government agrees. Defendant disagrees, arguing that the defendant has not been shown to have obstructed justice.

The PSR did not find a mitigating role adjustment, but defendant argues that a 2-level decrease pursuant to U.S.S.G. § 3B1.2 is warranted in light of defendant's minor role.

The PSR did not find that a financial institution 4-level increase was proper, but the government argues that a 4-level increase pursuant to U.S.S.G. § 2F1.1(b)(6)(B) is warranted because the offense affected a financial institution and defendant derived more that $1 million in gross receipts from the offense.

a. Loss Amount

The upward adjustment of 13 levels in the PSR is based on a loss calculation based on an intended loss of $3,057,927.09 which is the amount discharged in bankruptcy. The government agrees with this amount of loss. Defendant asserts that the actual loss is less than $120,000, warranting only a 6-level adjustment.

U.S.S.G. § 2F1.1 provides that "loss" is the value of the ["]money, property, or services unlawfully taken. . . . If an intended loss that the defendant was attempting to inflict can be determined this figure

will be used if it is greater than the actual loss." U.S.G.G. [sic] § 2F1.1 (11/1/94), Application Note 7.

Defendant relies on *United States v. Dolan* for the proposition that "[t]he district court should calculate the actual or intended loss amount by using either the value of the assets concealed or the value of the debtor's liability, whichever is less." 120 F.3d 856, 870 (8th Cir. 1997). Defendant asserts the following: 1) that the appropriate measure for losses is the value of concealed assets to creditors; 2) specific values were substantially overstated; 3) clear and convincing proof of the increase is necessary to prove the losses not included in the indictment or in counts on which the defendant was found guilty; 4) certain assets should not be considered; 5) assets listed in the PSR that were not before the jury should not be considered; and 6) the loss calculation can be no greater than that stipulated by the prosecution and Jeffrey Sherman. The defendant asserts that she was entitled to seek bankruptcy in 1995 and should not be liable for filing, but should only be liable for concealed assets.

The government asserts that the defendant's relevant conduct includes all acts and omissions, whether charged or uncharged. It asserts that the evidence at trial established defendant's actions and their connection to all listed assets by clear and convincing evidence.

i. Valuation of Concealed Assets

Defendant contends that Circuit law requires that the valuation of losses "take a realistic, economic approach to determine what losses the defendant caused or intended to cause, rather than use some method which does not reflect monetary loss." *United States v. Stoddard,* 150 F.3d 1140, 1146 (9th Cir. 1998). Defendant contends that this is best done by measuring "how much better off the victim would be but for the defendant's fraud." *United States v. Harper,* 32 F.3d 1387, 1391 (9th Cir. 1994). Moreover, the defendant contends that the appropriate measure in a bankruptcy case is the value of assets concealed or the value of the debtor's liability, whichever is less. *United States v. Dolan,* 120 F.3d 89, 95 (8th Cir. 1992). Defendant contends that the loss is only those assets the jury found to have been concealed: her interest in the BBL funds in Sanwa Bank and her interest in the Beverly Hills Medical funds in a First Interstate Bank Account. Since this amount is less than the amount discharged, defendant contends that it is her interest in those accounts (the concealed assets) that is the correct measure of loss.

The government asserts that the loss determination must reflect what the jury found the defendant to have concealed *and* all relevant conduct. It asserts that, in fraud cases, all acts and omissions that are part of the same scheme or course of conduct are relevant, not just those acts which were identified in specific counts of conviction. U.S.S.G. § 1B1.3(a)(2); *United States v. Scarano,* 975 F.2d 580, 584 (9th Cir.

1992) (utilizing the cumulative loss produced by the common scheme regardless of the number of counts of conviction to calculate the offense level in mail fraud). The government contends that, by participating in a conspiracy, defendant's relevant conduct encompasses "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense conviction." U.S.S.G. §1B1.3(a)(1)(B). The government further contends that the total amount of bankruptcy debt should be the amount of loss since many other valuable assets were hidden which would have off-set the amount discharged in bankruptcy. In addition, beyond those concealed assets, the defendants' income streams alone show that defendants could not file a legitimate bankruptcy. The government contends that the entire amount listed in a fraudulent bankruptcy petition should be considered the appropriate loss amount for sentencing. *United States v. Saacks,* 131 F.3d 540, 541 (5th Cir. 1997).

ii. Over-valuation of Assets

Defendant contends that the assets that do serve as the basis for loss under her theory are overvalued. She asserts that the BBL and Beverly Hills Medical accounts should be adjusted. to reflect taxes that would have been required to be paid and administrative expenses. Defendant asserts a loss amount of $85,000.

The government rejects defendant's theory that these assets are the only appropriate foundation for the loss amount.

iii. Standard of Proof

Defendant contends that any increase in the offense level must be demonstrated by clear and convincing proof. *United States v. Jordan,* 256 F.3d 922, 926 (9th Cir. 2001); *United States v. Munoz,* 233 F.3d 1117, 1126-26 (9th Cir. 2000). The defense claims to have established a loss of between $70,000 and $120,000, which corresponds to an offense level of 6. Because the PSR asserts an offense level of 13, defendant contends that this increase must be proven by clear and convincing evidence.

The government contends that the evidence at trial demonstrated that the defendant's declaration of bankruptcy was fraudulent. The government asserts that the total amount of assets were shown at the trial and the extent of the fraud were shown at trial.

iv. Consideration of Certain Assets

Defendant asserts that the Stein-Erickson condominium should not be considered as defendant was acquitted on Count 4 of the FSI, which listed the Stein-Erickson Condominium. Defendant also asserts that her valuation, not the government's, is the appropriate valuation, and that John Bussell handled all matters pertaining to the asset.

The government asserts that both assets are to be included in assessing the loss resulting from the defendant's conduct.

v. Assets in the PSR not Before the Jury

Defendant contends that not all assets listed in the PSR should be considered; only those before the jury should be used to calculate the loss amount. The defendant asserts that this is required to ensure that the prosecution is limited to the unique allegations of the indictment. *See Russell v. United States,* 361 U.S. 749, 768-771 (1962); *United States v. Shipsey,* 190 F.3d 1081, 1085-86 (9th Cir. 1999). Under this reasoning, defendant asserts that the following assets should not be considered as items defendant could reasonably foresee were part of her conduct: 1) the Palm Springs condominium, 2) the San Diego farm parcels, and 3) the equipment purchased by Magnum Industries.

The government contends that all the assets, even those not presented to the jury, were reasonably foreseeable as assets discharged or concealed during the conspiracy to commit fraudulent bankruptcy.

Court's Ruling on Loss Issues

The 13-level adjustment should be applied, based on an intended loss of $3,057,927. *United States v. Saacks,* 131 F.3d 540 (5th Cir. 1997). Clear and convincing evidence supports a

finding that defendant's relevant conduct includes all Bussell assets, whether or not the subject of indictment and irrespective of acquittal, because the common scheme shown by the conspiracy includes the reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction.

b. Adjustment for Obstruction of Justice

The PSR recommends an 2-level increase for obstruction of justice. PSR §§ 91-94, Addendum to the PSR, §§ 49-64.

Defendant contends that there should be no upward adjustment for obstruction of justice. She contends: 1) that communications by the defendant regarding claims of IRS and U.S. Attorney's office harassment were protected speech; 2) that the complaints about misconduct did not impede any investigation; 3) that defendant's testimony was not willfully intended to provide false testimony on a material matter; and 4) that defendant did not provide a fraudulently backdated letter.

U.S.S.G. § 3C1.1 increases the offense level by two levels where "(A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's

offense of conviction and any relevant conduct; or (ii) a closely related offense." U.S.S.G. § 3C1.1. The application notes explicitly enumerate unlawfully influencing a witness and committing or suborning perjury and producing a false, altered, or counterfeit document during an official investigation or proceeding. U.S.G.G. [sic] §§ 4(a), (b), (c).

i. Perjury

The obstruction enhancement applies to a defendant who commits perjury at trial. *United States v. Dunnigan,* 507 U.S. 87, 93-95 (1993). The sentencing court is required [to] make an independent finding that the witness: 1) gave false testimony under oath, 2) concerning a material matter, 3) with willful intent as opposed to confusion, mistake, or faulty memory. *Dunnigan,* 507 U.S. at 94-95; *United States v. Robinson,* 63 F.3d 889, 892 (9th Cr. [sic] 1995); *United States v. Jimenez,* No. 01-50597, 2002 U.S. App. Lexis 17706 (9th Cir. August 27, 2002). As a procedural safeguard, the findings must be made with specificity. *Dunnigan,* 507 U.S. at 96-98.

The government presents nine (9) instances of allegedly perjurious statements.

ii. Intimidate or Unlawfully Influencing Witnesses

Defendant contends that she did not attempt to intimidate or improperly influence witnesses, and thus did not obstruct justice pursuant to § 3C1.1.

The government asserts that defendant attempted to intimidate or unlawfully influence witnesses Joan Isaacs and Robert Beaudry.

iii. Filing False Documents

Defendant contends that she filed no false documents in an attempt to obstruct justice. The government asserts and the PSR adopts the position that defendant, through her defense counsel, Nathan Hochman, filed a fraudulently backdated letter to the Court in her Opposition to the government's motion for a finding of the crime-fraud exception to attorney-client privilege. Defendant allegedly did this to sustain a claim of attorney-client privilege and prevent the subpoena of Steven Berson. Defendant contends that the letter was provided by Jeffrey Sherman's counsel and neither defendant nor defendant's counsel knew it might have been backdated.

Court's Ruling on Obstruction of Justice

The Court finds that the following material, false statements were made by defendant as a witness before the jury, with willful intent to influence the verdict: (1) defendant's testimony that she first heard about Syntex Financial, Inc., in the government's discovery documents; (2) defendant's testimony that she was not contemplating bankruptcy until March 7, 1995; (3) defendant's testimony that the purpose of

the organizational structure of the defendant's medical practice was to ensure the stability of the practice, not to conceal assets; and (4) defendant's denial of any intent to conceal assets, undervalue assets, or prevent creditors from reaching assets when filling out the bankruptcy questionnaire in 1995.

The Court finds that substantial evidence exists to adjust the offense level by 2 levels for obstruction of justice.

c. Adjustment for Minor Role

Defendant contends that the offense level should be decreased 2 levels, because defendant played a minor role.

U.S.S.G. § 3B1.2 allows a decrease of 2 levels for a minor participant. The Application Notes to § 3B1.2 hold that the adjustment is applicable where the defendant is substantially less culpable than the average participant or is convicted of significantly less serious offenses. U.S.S.G. § 3B1.2 n.3(A) & (B). In addition, the Notes define a minor participant as one who is "less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. §3B1.2 n5. The determination of the adjustment is "'heavily dependent upon the facts of the particular case.'" *United States v. Hill,* 953 F.2d 452, 461 (9th Cir. 1991) *quoting* U.S.S.G. § 3B1.2. The sentencing court should compare the defendant's conduct with others involved in the offense. *United States v. Petti,* 973 F.2d 1441, 1447 (9th Cir. 1991).

However, being less culpable does not automatically result in the defendant being accorded minor status. *United States v. Andrus,* 925 F.2d 335, 337-38 (9th Cir. 1991).

The government argues that defendant was an integral part of the scheme and essential for recruiting the nominee corporate "owners."

Court's Ruling on Minor Role Adjustment

Considering the evidence presented during trial and the arguments submitted in the sentencing papers, the Court concludes that defendant was not a minor participant, and thus a decrease of 2 levels is not warranted.

d. Adjustment for Affecting a Financial Institution and Deriving $1,000,000 gross

The government contends that a 4-level upward adjustment is warranted because the defendant's conduct affected a financial institution and defendant derived $1,000,000 from the offense. The PSR does not recommend this adjustment, stating that defendant did not derive $1,000,000 individually under the plain meaning of the word derive but merely retained it. PSR ¶¶ 85-87. The defendant asserts that: 1) no financial institution was affected; 2) the offense did not involve gross receipts of $1,000,000; 3) the defendant did not individually derive $1,000,000; and 4) there is no proof that $1,000,000 was derived entirely from the affected financial institution. Furthermore, defendant

contends that recent changes to the Guidelines provide clarification about the application of what affects financial institutions, such that the $1,000,000 must be derived directly from the financial institution for the adjustment to apply.

U.S.S.G. § 2F1.1(b)(6)(B) provides for a 4-level increase in offense level if the "offense affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense." U.S.S.G. §2F1.1(b)(6(B). Note 14 states that "financial institution" is defined to include a bank or insurance company and institutions, and it further incorporates institutions described in 18 U.S.C. § 657 (which includes the FDIC). U.S.S.G. § 2F1.1, n.14. Note 16 clarifies that "deriving" generally means the gross receipts of $1,000,000 must be to the defendant individually. U.S.S.G. §2F1.1, n.16; *United States v. Kohli,* 110 F.3d 1475, 1477 (9th Cir. 1997). Furthermore, gross receipts include "all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense." U.S.S.G. §2F1.1, n.16.

The government argues that gross receipts from the offense conduct includes retaining control and beneficial ownership of illegally concealed assets. *United States v. Stolee,* 172 F.3d 630, 631 (8th Cir. 1999). In addition, it argues that the guidelines indicate that defendant must derive the $1,000,000 from the offense, not directly from the financial institution. *United States v. Monus,* 128 F.3d 376, 397 (6th Cir[.] 1997); *United States v. Hartz,* 296 F.3d 595,

599 (7th Cir. 2002); *United States v. Johnson,* 130 F.3d 1352, 1354 (9th Cir. 1997).

Subsequent Sentencing Commission clarification of § 2F1.1 indicates that the term "affect" should focus on "whether the defendant derives more than $1,000,000 in gross receipts from [the] financial institution as a result of the offense." U.S.S.G., App. C, amend. 617 at 1203. Defendant asserts that this change is a clarification that has binding, retroactive authority under *Stinson v. U.S.*, 508 U.S. 36, 38-39 & n.1 (1993) (affording binding precedential authority to commentary in the Guidelines Manual). Defendant asserts that this clarification requires that the individual derive the $1,000,000 from the affected institution itself.

Court's Ruling on Affecting a Financial Institution and Deriving $1,000,000

The Court does not find that the adjustment applies in that defendant did not individually derive $1,000,000 from an offense affecting a financial institution. Therefore, the offense level is not increased 4 levels.

4. Parties' Positions as to Departures from the Sentencing Guidelines

Defendant asserts the following grounds for downward departure: 1) exceptional family circumstances; 2) aberrant behavior; 3) hardship to employees and patients; 4) disparity of coconspirators' sentences; 5) impaired capacity; 6) current mental,

emotional, and physical condition; and 7) charitable works.

The government asserts that no downward departure is warranted in this case and argues against each of the enumerated grounds.

The Court has read and considered 248 letters from friends, family, patients, colleagues, and community organizations in support of defendant. The Court takes into consideration those issues presented by defendant and the circumstances surrounding her trial.

Court's Ruling on Departure

The Court is inclined to conclude that defendant's case is extraordinary insofar as exceptional family circumstances exist, namely, the suicide of her husband and co-conspirator, and therefore, a downward departure level may be in order.

5. Applicable Guidelines

Before departure, the applicable guidelines are:

Total Offense Level: 25 ;

Criminal History Category: I ;

57 to 71 months imprisonment;

2 to 3 years supervised release, pursuant to § 5D1.2;

$10,000 to $100,000 fine, pursuant to § 5E1.2 of the Guidelines.

6. Fine

Defendant is ordered to pay a fine.

7. Restitution

The PSR recommends restitution of $3,057,927.09 pursuant to 18 U.S.C. § 3663. The Court finds that restitution to Provident should be the $100,000 agreed to in the parties' settlement, and, otherwise, the amounts shown in the discharge should be the subject of restitution. However, any compensation that a victim receives from other sources, including forfeited funds and funds resulting from foreclosure on any relevant IRS liens, shall be counted towards satisfaction of the amount owed in restitution.

a. Pre-1996 Application and Forfeiture

Defendant objects that the restitution should be governed by the Pre-1996 version to avoid violating the *ex post facto* clause. *United States v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997). This would require off-setting restitution by the amount of money forfeited. *United States v. Johnston,* 199 F.3d 1015, 1023 (9th Cir. 1999). Defendant claims that the government has already instituted four forfeiture proceedings seeking: 1) the Stein-Erickson apartments, 2) rents from said apartments, and 3), 4) each of the San Diego farm parcels.

b. Restitution Consistent with Actual Loss

Defendant asserts that the determination of actual loss is limited to the loss directly related to the defendant's criminal conduct. *United States v. Sablan,* 92 F.3d 865, 870 (9th Cir. 1996). In addition, the restitution that results must be definite and limited to the amount actually lost by victims. *United States v. Barany,* 884 F.2d 1255, 1261 (9th Cir. 1989).

c. Ability to Pay

Defendant contends PSR inaccurately states that she has the ability to pay restitution. Defendant asserts that, since her interview in March, 2002, the IRS has commenced proceedings to collect more than $3.4 million.

The addendum to the PSR acknowledges that proceedings have commenced, but maintains its previous position since it draws no conclusion about the ultimate outcome of those proceedings.

The Court orders that defendant pay restitution.

8. Special Assessment

Defendant is ordered to pay a $300.00 special assessment to the United States, pursuant to 18 U.S.C. § 3013(a).

9. Cost of Prosecution

The government also seeks to impose the costs of prosecution under 26 U.S.C. § 7201 in the amount of $62,614.37. The defendant seeks to limit the costs of prosecution to the costs associated only with the successfully prosecuted counts against defendant.

26 U.S.C. § 7201 provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be fined not more than $100,000 . . . or imprisoned more than 5 years, or both, together with the costs of prosecution."

The government asserts that the imposition of cost is mandatory, citing *U.S.* [*v.*] *Chavez.*, 627 F.2d 953, 954-55 (9th Cir. 1980). The government further asserts that, while costs must be associated with a successful prosecution, the costs need not be allocated if there are acquittals on some counts, if there is more than one defendant, or if the costs would have been incurred even if the count resulting in acquittal or against other defendants had not been charged. *U.S. v. Fowler,* 794 F.2d 1446, 1450 (9th Cir. 1986). 28 U.S.C. § 1920 lists categories of assessable costs.

Defendant asserts that the Court retains discretion to determine which costs in the category to impose. 28 U.S.C. § 1920; *United States v. Procario,* 361 F.2d 683, 684 (2d Cir. 1966). Defendant asserts that the prosecution may only recover costs associated with a successful prosecution under 26

U.S.C. § 7201. *United States v. Palmer,* 809 F.2d 1504, 1508-09 (11th Cir. 1987); *Fowler,* F.2d at 1450.

Pursuant to 26 U.S.C. § 7201, the Court imposes on the defendant the costs of prosecution as sought by the government in the amount of $62,614.37.

10. Government counsel should address the status of underlying indictments.

11. Appeal

Defendant is hereby advised that an appeal of the Court's sentence pronounced this day may be taken. For an appeal to be effective, defendant must file a Notice of Appeal with the Clerk of this Court not later than ten days from today's date. Failure to file a Notice of Appeal will result in there being no appellate review of the Court's sentence.

Defendant is hereby advised that if defendant is unable to hire counsel for representation on appeal, defendant may apply to the Court for appointment of counsel by submitting a financial affidavit to show that defendant is eligible for Court-appointed counsel to represent defendant on appeal.

APPENDIX G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LETANTIA BUSSELL, et al., Defendants.	) SA CR 01 56 AHS) ~~CR 00-485-JSL~~)) ORDER DENYING DEFENDANTS' MOTION TO DISMISS COUNTS 2, 3, AND 13 OF FIRST SUPERSEDING INDICTMENT AND MOTION TO STRIKE ALLEGATIONS)) (Filed Feb. 7, 2001)

The motion to dismiss counts 2, 3, and 13 of the first superseding indictment and the motion to strike allegations concerning fraudulent conduct associated with BBL Medical Mgt, Inc. and Beverly Hills Dermatology Medical Corp. of defendants, LETANTIA BUSSELL, et al., came on regularly before the court on February 5, 2001.

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion to dismiss counts 2, 3, and 13 of the first superseding indictment and the motion to strike allegations concerning fraudulent conduct associated with BBL

Medical Mgt, Inc. and Beverly Hills Dermatology Medical Corp. of defendants, LETANTIA BUSSELL, et al., be DENIED.

IT IS SO ORDERED.

DATED: 2/7/01 /s/ J. Spencer Letts
J. Spencer Letts
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LETANTIA BUSSELL, Defendant-Appellant.	No. 02-50495 D.C. No. CR-01-00056-AHS-02 Central District of California, Santa Ana ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. LETANTIA BUSSELL, Defendant-Appellee.	No. 02-50528 D.C. No. CR-01-00056-AHS Central District of California, Santa Ana (Filed Sep. 6, 2005)

Before: NOONAN and CLIFTON, Circuit Judges, and FOGEL,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Clifton has voted to deny the

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* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

petition for rehearing en banc, and Judges Noonan and Fogel so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed August 2, 2005, are DENIED.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LETANTIA BUSSELL, Defendant-Appellant.	No. 06-50088 D.C. No. CR-01-00056-AHS-02 Central District of California, Santa Ana ORDER (Filed Dec. 5, 2007)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LETANTIA BUSSELL, Defendant-Appellant.	No. 06-50140 D.C. No. CR-01-00056-AHS-01 Central District of California, Santa Ana

Before: O'SCANNLAIN, LEAVY, and CALLAHAN, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing. Judge O'Scannlain and Judge Callahan voted to reject the suggestion for rehearing en banc and Judge Leavy so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX J

UNITED STATES CODE

1994 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE UNITED STATES, IN FORCE ON JANUARY 4, 1995

* * *

18 U.S.C. § 3663. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or section 46312, 46502, or 46504 of title 49, may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the

compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in –

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than –

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced –

(1) by the United States –

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

(i)(1) A Federal agency shall immediately suspend all Federal benefits provided by the agency to the defendant, and shall terminate the defendant's eligibility for Federal benefits administered by that agency, upon receipt of a certified copy of a written judicial finding that the defendant is delinquent in making restitution in accordance with any schedule of payments or any requirement of immediate payment imposed under this section.

(2) Any written finding of delinquency described in paragraph (1) shall be made by a court, after a hearing, upon motion of the victim named in the order to receive the restitution or upon motion of the United States.

(3) A defendant found to be delinquent may subsequently seek a written finding from the court that the defendant has rectified the delinquency or that the defendant has made and will make good faith efforts to rectify the delinquency. The defendant's eligibility for Federal benefits shall be reinstated upon receipt by the agency of a certified copy of such a finding.

(4) In this subsection, "Federal benefit" means a grant, contract, loan, professional license, or commercial license provided by an agency of the United States.

* * *

18 U.S.C. § 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim

as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

* * *

APPENDIX K

UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re Bussell, John

Bussell, Letantia — Case No. (if known)
Debtors

SCHEDULE B – PERSONAL PROPERTY

Type of property Description and location of property	Current market value of debtor interest in property without deducting any secured claim

1. Cash on hand.

   Cash

   Debtor interest: **100.00**

   Owner: **Joint**
   Location: **In debtor possession.**

2. Checking, savings, or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.

   First Pacific National Bank
   Branch 005
   Account No. XXXXXXXXX

   Debtor interest: **3,826.30**

   Owner: **Husband**
   Location: **In debtor possession.**

3. Security deposits with public utilities, telephone companies, landlords, and others.
   None

4. Household goods and furnishings, including audio, video, and computer equipment.

   Various furnishings and appliances
   Debtor interest: **2,000.00**
   Owner: **Joint**
   Location: **In debtor possession.**

5. Books, pictures, and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles.
   None

6. Wearing apparel.

   Assorted clothing and garments, etc.
   Debtor interest: **500.00**
   Owner: **Joint**
   Location: **In debtor possession.**

7. Furs and jewelry.

   Jewelry
   Debtor interest: **500.00**
   Owner: **Joint**
   Location: **In debtor possession.**

8. Firearms and sports, photographic, and other hobby equipment.
   None

9. Interests in insurance policies.
   Disability Insurance Policies:
   Debtor interest: **44,650.00/mo.**

Connecticut Mutual
Policy No. XXXXXXX
Monthly Claim Benefit: $15,950.00

Provident
Policy No. X-XXX-XXXXXX
Monthly Claim Benefit: $ 9,200.00
Claim Benefit subject to pending litigation

American General
Policy No. X XXX XXX
Monthly Claim Benefit: $10,000.00

John Hancock
Policy No. XXXX XXX XXX
Monthly Claim Benefit: $ 9,500.00
Claim Benefit subject to pending litigation

Maccabees
Policy No. XXXXXXX
Monthly Claim Benefit: $ -0-
Company ceased paying claim 12/94

All American Life
Policy No. XXXXXXXXXX
Monthly Claim Benefit: $ -0-
Company not paying claim

Paul Revere
Policy No. X-XXXXX
Monthly Claim Benefit: $ -0-
Company not paying claim
Claim Benefit subject to pending litigation

North American Life
Policy No. XXXXXXXXXXX
Monthly Claim Benefit: $ -0-
Company not paying claim
Owner: **Husband**
Location: **In debtor possession.**

Term Life Insurance Policies: Debtor interest: **no cash value**

Transamerica
Policy No. XXXXXXXX
Face Value: $72,000
Pre-Paid Premiums: -0-

John Hancock
Policy, No. XXXXXXXX
Face Value: $1,000,000
Pre-Paid Premiums: -0-

Connecticut Mutual
Policy No. XXXXXXX
Face Value: $1,000,000
Pre-Paid Premiums: -0-

Connecticut Mutual
Policy No. XXXXXXX
Face Value $2,000,000
Pre-Paid Premiums: -0-

Union Mutual
Policy No.
Face Value: $1,000,000
Pre-Paid Premiums: -0-
Owner: Joint
Location: In debtor possession.

10. Annuities.
None

11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans.
None

12. Stock and interests in incorporated and unincorporated businesses.

100% of stock (100 shares):
JB Surgical Medical Corporation
Debtor interest: -0-
Owner: **Husband**
Location: **In debtor possession.**
Additional info.: **All accounts receivable collected in 1993. Corporation suspended 11/1/94.**

100% of stock (2,500 shares):
Letantia B. Bussell, M.D., Inc.
Debtor interest: -0-
Owner: **Wife**
Location: **In debtor possession.**
Additional info.: **Corporation ready to dissolve, suspended 2/1/95.**

100% of stock in L.B. Bussell Medical Corporation
Debtor interest: **1,000.00**
Owner: **Wife**
Location: **In debtor possession.**
Additional info.: **Value based on book value received from corporate accountant.**

100% of stock in TLK Enterprises, Inc.
Debtor interest: -0-
Owner: **Joint**
Location: **In debtor possession.**
Additional info.: **Corporation suspended**

13. Interests in partnerships or joint ventures.

General Partner:
Star Hills Partners, L.P.
Debtor interest: -0-
Owner: **Husband**
Location: **In debtor possession.**
Additional info.: **Partnership properties currently in foreclosure**

14. Government and corporate bonds and other negotiable and non-negotiable instruments.
None

15. Accounts receivable.
None

16. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled.
None

17. Other liquidated debts owing debtor including tax refunds.
None

18. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property.
None

19. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.
None

20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims.
None

21. Patents, copyrights, and other intellectual property.
None

22. Licenses, franchises, and other general intangibles.
None

23. Automobiles, trucks, trailers, and other vehicles or accessories.

1979 Honda 150 Motorcycle
VIN: L18555009061

Debtor interest: **100.00**

Owner: **Husband**
Location: **In debtor possession.**

24. Boats, motors, and accessories.
None.

25. Aircraft and accessories.
None

26. Office equipment, furnishings, and supplies.
None

27. Machinery, fixtures, equipment, and supplies used in business.
None

28. Inventory.
None

29. Animals.
None

30. Crops – growing or harvested.
None

31. Farming equipment and implements.
None

32. Farm supplies, chemicals, and feed.
None

33. Other personal property of any kind not already listed.
None

Total: **8,026.30**

APPENDIX L

UNITED STATES BANKRUPTCY COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

In re: **Bussell, John**
and
Bussell, Letantia
Debtors

Case No. (if known)

STATEMENT OF FINANCIAL AFFAIRS

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1. Income from employment or operation of business.

NONE | | State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year.

HUSBAND

This year:	1995	Amount:
Source:	**none**	
Last year:	1994	Amount:
Source:	**none**	
Previous year:	1993	Amount: **8,308.00**
Source:	**earnings**	

WIFE

This year:	1995	Amount:	10,000.00
Source:	earnings (year-to-date)		
Last year:	1994	Amount:	98,000.00
Source:	earnings		
Previous year:	1993	Amount:	84,000.00
Source:	earnings		

* * *

11. Closed financial accounts.

NONE | | List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within one year immediately preceding the commencement of this case.

Bank of California
Beverly Hills Branch #075

Account No. XX-XXXXXX (Letantia Bussell)
Date Closed: 12/7/94
Balance: $ -69.00

Account No. XX-XXXXXX (John Bussell)
Date Closed: 12/7/94
Balance: $ -93.00

Accounts closed due to IRS Levy

* * *

16. Nature, location, and name of business.

NONE |X| a. For individuals, list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the two years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

NONE |X| b. If the debtor is a partnership, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities, within the two years immediately preceding the commencement of this case.

* * *

APPENDIX M

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 1999 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. JOHN BUSSELL, LETANTIA BUSSELL, and JEFFREY SHERMAN, Defendants.	SA CR 01-56(A)-AHS REDACTED FIRST SUPERSEDING INDICTMENT [18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 152: False Statements, False Oaths, and Concealed Assets in Bankruptcy; 18 U.S.C. § 1956: Money Laundering; 18 U.S.C. § 2: Aiding and Abetting and Causing an Act to be Done; 26 U.S.C. § 7201: Attempt to Evade or Defeat Tax; 26 U.S.C. § 7206(2): Aiding and Assisting in the Preparation and Presentation of False and Fraudulent Tax Return] (Filed Jan. 31, 2002)

The Grand Jury charges:

COUNT ONE

[JOHN BUSSELL, LETANTIA BUSSELL AND JEFFREY SHERMAN]

[18 U.S.C. § 371]

INTRODUCTION

At all times relevant to this indictment:

A. THE PARTIES AND THEIR FINANCIAL BACKGROUND

1. Defendant JOHN BUSSELL was a licensed physician with a specialty in [anesthesiology]. He operated a profitable medical practice in Los Angeles County, within the Central District of California, for approximately 18 years, until he suffered an alleged disability resulting from his fall in a Builder's Emporium in September 1992.

2. Defendant LETANTIA BUSSELL was the wife of defendant JOHN BUSSELL and was a licensed physician with a specialty in dermatology. From June 1981 through December 1992, she operated a profitable dermatology practice in Beverly Hills, California through a medical corporation called Letantia Bussell, MD, Inc., of which she was the sole owner. In 1991 and 1992, defendant LETANTIA BUSSELL's annual salary from Letantia Bussell MD, Inc., has reflected on her personal income tax returns, equaled $720,000 and $500,000, respectively.

3. During the tax years 1983, 1984, 1986 and 1987, defendants JOHN and LETANTIA BUSSELL ("the BUSSELLS") jointly incurred substantial, unpaid federal and state income tax liabilities. As a consequence of their ongoing failure to satisfy these tax obligations, federal tax liens were imposed upon the BUSSELLS in January and September 1994 in

the total amount of approximately $1,068,403. The Franchise Tax Board of the State of California also asserted claims during this same time period against the BUSSELLS for their non-payment of state income tax for the years 1983, 1984, 1986 and 1987 in the total amount of approximately $136,818. In addition, the BUSSELLS owed the Bank of Beverly Hills approximately $787,500 during this same time period as a result of their May 1991 settlement of a loan default claim asserted by Bank of Beverly Hills against TLK Enterprises, Inc., a company owned and controlled by the BUSSELLS between 1986 and 1991.

4. Defendant JEFFREY SHERMAN ("SHERMAN") was an attorney and a certified public accountant, who operated a professional corporation located in Los Angeles County, within the Central District of California, known as the Tax Consulting Group ("TCG"). Defendant JEFFREY SHERMAN formed TCG in 1992 and hired a staff of accountants and attorneys to provide legal advice concerning bankruptcy matters and to offer tax preparation, reporting and compliance services as well as general accounting services.

5. TCG specialized in the area of pre-bankruptcy tax planning, which consisted of advising clients on how to restructure their existing assets and to "age" their outstanding tax liabilities in order to maximize their prospects of discharging their tax debts in subsequently-filed bankruptcy proceedings. Defendants JOHN and LETANTIA BUSSELL engaged the services of TCG and

defendant SHERMAN from 1992 through 1995 in order to take advantage of TCG's expertise in pre-bankruptcy tax planning.

6. Robert Beaudry ("Beaudry") was an attorney practicing law in Los Angeles County, within the Central District of California: Beaudry specialized in the area of asset protection, counseling and assisting clients in forming corporations through which they could conceal their property interests from creditors and other third parties. In promoting this purpose, Beaudry recommended, among other things, the use of "nominee" shareholders and officers in setting up these corporations.

7. A "nominee shareholder or officer" is someone who has no genuine ownership interest in or actual managerial authority over a corporation, but who is enlisted by the client setting up the corporation to appear as the owner and officer of public record.

8. Starting in 1992 and continuing through 1995, defendants JOHN and LETANTIA BUSSELL engaged Beaudry to provide asset protection services in conjunction with the pre-bankruptcy tax planning services offered by defendant SHERMAN and TCG.

B. THE BUSSELL BANKRUPTCY

9. On or about March 7, 1995, defendants JOHN and LETANTIA BUSSELL filed in the United States Bankruptcy Court for the Central District of California a Chapter 7 joint bankruptcy case entitled

"*In re John Bussell and Letantia Bussell, Debtors*," bearing case number LA 95-15967-TD (the "Bussell bankruptcy"). In commencing their bankruptcy case, defendants JOHN and LETANTIA BUSSELL were assisted by defendant SHERMAN, who served as their attorney in preparing the bankruptcy filing and signed the bankruptcy petition.

10. A bankruptcy case is commenced by the filing of a petition in bankruptcy. The person or persons seeking relief from debts are referred to as the "debtor" or "debtors."

11. The commencement of a bankruptcy case triggers what is known as an "automatic stay" against the debtor's creditors, who are immediately forbidden to take any action on claims they may have against the debtor or his property, unless permission of the bankruptcy court is first obtained.

12. Aside from the automatic stay, the filing of a petition in bankruptcy has another immediate effect: it creates, by operation of law, what is known as "the estate" in bankruptcy. The bankruptcy "estate" is comprised of essentially all the debtor's property or interests therein of any kind, wherever located and by whomever held. The estate is administered by a court-appointed trustee and includes anything in which the debtor has a legal or equitable interest, and, subject only to a few exceptions, includes everything the debtor owns, without regard to value.

13. A petition filed under Chapter 7 of the bankruptcy code (such as the Bussell bankruptcy)

does not allow the debtor to remain in possession of all of the property comprising the bankruptcy estate. Instead, the Chapter 7 process requires the debtor to disclose all property, claim any exemptions, and then allow. the bankruptcy trustee to sell all the non-exempt property (a process known as "liquidation") and expeditiously pay creditors as much as possible.

14. A debtor has certain duties after filing for bankruptcy. The debtor is required to file promptly a list of creditors, a schedule of assets and liabilities, a schedule of current income and expenses, and a statement of the debtor's financial affairs. All the property owned or controlled by the debtor must be disclosed in these schedules and in the statement of financial affairs, even if the debtor is uncertain as to whether it is property of the "estate."

15. The statement of financial affairs, in particular, requires the debtor to disclose his income both for the year in which the bankruptcy is filed, as well as for the two years immediately preceding the filing year. The schedules and statement are required to be signed by the debtor under penalty of perjury. Accordingly, the BUSSELLS were required on their statement of financial affairs truthfully to disclose their income for the years 1993 through March 1995.

16. A debtor must also submit to questioning under oath by the trustee and creditors concerning the debtor's assets, liabilities and financial affairs. In the case of the Bussell bankruptcy, defendant JOHN

BUSSELL submitted to questioning under oath by the bankruptcy trustee on April 14, 1995, in the presence of defendant LETANTIA BUSSELL, and defendant JOHN BUSSELL was examined under oath by creditors in the presence of defendant SHERMAN on May 31, 1995 and July 11, 1995.

17. If the debtor successfully completes the bankruptcy process, the debtor will obtain permanent discharge from most past debts, with a few limited exceptions, allowing the debtor to make a fresh financial start.

18. Among the debts dischargeable in bankruptcy are federal and state income taxes, subject to the following three conditions: (1) such taxes must be due and owing, and the returns required to be filed, in excess of three years prior to the date of the filing of the bankruptcy petition; (2) such taxes must be finally assessed by the proper governmental agency in excess of 240 days prior to the date of the filing of the bankruptcy petition; and (3) the tax returns for such taxes must have been filed in excess of two years prior to the date of filing of the bankruptcy, petition.

C. THE BUSSELLS' INCOME AND ASSETS AS OF THEIR FILING FOR BANKRUPTCY

19. Starting in January 1993 and continuing through March 1995, defendant LETANTIA BUSSELL operated her dermatology practice through three separate corporations, which she and defendant

JOHN BUSSELL effectively owned, managed and controlled: BBL MedicalManagement, Inc. ("BBL"), Beverly Hills Dermatology Medical Corporation ("Beverly Hills Medical"), and L.B. Bussell Medical, Inc. ("L.B. Bussell"). All three corporations were incorporated by Beaudry between June 1992 and February 1993 and commenced doing business in January 1993.

20. Between January 1993 and March 1995, BBL had annual gross receipts in excess of $1.5 million and annual profits in excess of $508,000. The BUSSELLS maintained and controlled these funds in several different bank accounts. The BUSSELLS used Beverly Hills Medical principally as a conduit through which they transferred a portion of BBL's profits to L.B. Bussell, which paid defendant LETANTIA BUSSELL's salary. During this time period, defendant LETANTIA BUSSELL's annual salary, as reflected on her tax returns, was between 10 and 20% of the profits earned by BBL and retained by the BUSSELLS.

21. Starting in about January 1993 and continuing through March 1995, defendant JOHN BUSSELL received disability payments of approximately $50,000 a month under several disability insurance policies with different insurers, resulting in total payments to him during this time period of approximately $1.5 million.

22. As of the date of the filing of their bankruptcy, defendants JOHN and LETANTIA

BUSSELL were the owners of a 4-unit condominium at the Stein Eriksen Lodge, a ski lodge, which was located in Park City, Utah (the "Stein Eriksen condo"). The Stein Eriksen condo had a market value of between $800,000 to $900,000, at or about the date the Bussell bankruptcy commenced.

23. Utah Home Loan and Finance, Inc. ("UHL") was a Utah corporation which was incorporated on or about March 5, 1993 by Derek Rowley ("Rowley"), who served as its principal nominee officer and director. UHL was a corporation set up by Beaudry for the benefit of defendants JOHN and LETANTIA BUSSELL. In incorporating UHL, Rowley was acting pursuant to the express instructions of Beaudry, who paid the required costs of incorporation, selected Rowley to serve as nominee officer and director, and directed all of Rowley's subsequent activities on behalf of UHL.

OBJECTS OF THE CONSPIRACY

24. Beginning in or about June 1992 and continuing to in or about February 1996, in Los Angeles County, within the Central District of California and elsewhere, defendants JOHN BUSSELL, LETANTIA BUSSELL and JEFFREY SHERMAN, together with unindicted co-conspirator Robert Beaudry, and others known and unknown to the Grand Jury, unlawfully and knowingly combined, conspired, confederated and agreed to commit the following offenses against the United States:

a. In contemplation of filing for bankruptcy under Title 11 by the BUSSELLS and with intent to defeat the provisions of Title 11, to knowingly and fraudulently conceal or transfer the BUSSELLS' property, while acting either in a personal capacity or as an agent of the BUSSELLS, in violation of Title 18, United States Code, Section 152(7);

b. To knowingly and fraudulently make and cause to be made false statements under penalty of perjury in, and in relation to, the Bussell bankruptcy, in violation of Title 18, United States Code, Section 152(3); and

c. To knowingly and fraudulently conceal assets of the bankruptcy estate in the Bussell bankruptcy, in violation of Title 18, United States Code, Section 152(1).

25. The purpose of the conspiracy was to enable defendants JOHN and LETANTIA BUSSELL to discharge their outstanding debts, including a subtantial [sic] federal tax debt, through filing bankruptcy in March 1995, while maintaining control over and access to (1) property concealed and transferred in the preceding two years in contemplation of bankruptcy, and (2) property of the bankruptcy estate, by means of fraud, concealment and misrepresentations.

MEANS OF THE CONSPIRACY

26. The objects of the conspiracy were accomplished in substance in the following ways, among others:

A. CONCEALMENT OF PROPERTY IN CONTEMPLATION OF BANKRUPTCY

27. Starting in June 1992, in order to eliminate debts incurred between 1983 and 1991, including outstanding federal and state income taxes of approximately $1.2 million and a $787,000 claim by the Bank of Beverly Hills, defendants JOHN and LETANTIA BUSSELL engaged the pre-bankruptcy tax planning and asset protection services of defendant SHERMAN and Robert Beaudry. Defendant SHERMAN and Beaudry, in consultation with the BUSSELLS, devised the following scheme in order to enable the BUSSELLS to conceal their assets from creditors and fraudulently to discharge their outstanding debts in bankruptcy:

a. Starting in January 1993, defendant LETANTIA BUSSELL would cease to conduct her dermatology practice through Letantia Bussell, MD, Inc., a corporation of which she was the sole owner of public record and through which she earned between $500,000 to $720,000 in the preceding two years. Instead, with the assistance of defendant SHERMAN and Beaudry, she would re-structure her business by managing and controlling its operations, in concert with defendant JOHN BUSSELL, through three

different corporations: BBL, Beverly Hills Medical, and L.B. Bussell. These three corporations would operate as follows:

i. The first corporation, BBL, would receive all the gross receipts generated by the dermatology practice, pay out all the expenses and overhead, and retain the profits of the business. The owners and officers of BBL would be nominees, while defendants JOHN and LETANTIA BUSSELL would effectively continue to manage and control the dermatology practice through BBL and retain possession and control of all its earnings. The second corporation, Beverly Hills Medical, which was also held in the name of a nominee, would serve as a conduit through which the BUSSELLS would transfer between 10-20% of BBL's profits to the third corporation, L.B. Bussell, which would pay the salary of defendant LETANTIA BUSSELL in an amount substantially less than in prior years. The owner and officer of public record of L.B. Bussell was defendant LETANTIA BUSSELL.

b. In managing the financial affairs of BBL, defendants JOHN and LETANTIA BUSSELL would divert approximately 80% of the profits generated by BBL into a non-interest bearing BBL account maintained at the Sanwa Bank ("the Sanwa account") in the names of nominee signatories Gerald Kusch and Josephine Issacs.

28. Between January 1993 and the filing of the Bussell bankruptcy in March 1995, defendants JOHN

and LETANTIA BUSSELL operated and managed the dermatology practice through this three-tiered structure of corporations – BBL, Beverly Hills Medical and L.B. Bussell – set up by defendant SHERMAN and Beaudry. In so doing, they were able to divert $949,048 of profits generated by the dermatology practice into the non-interest bearing Sanwa account, using nominee officers of BBL as authorized signatories on the account.

29. On or about March 1994, defendant SHERMAN met with an accountant working with TCG to explain the three-tiered structure of corporations – BBL, Beverly Hills Medical and L.B. Bussell – through which defendant LETANTIA BUSSELL operated her dermatology practice, so that this accountant could provide accounting and tax preparation services for these corporations, including the two nominee corporations, BBL and Beverly Hills Medical.

30. On or about March 14, 1994, defendant SHERMAN signed a check payable to the Internal Revenue Service in the amount of $3,500 for payment of 1993 Form 7004 corporate taxes for Beverly Hills Medical, the middle corporation.

31. On or about June 1, 1994, defendant SHERMAN prepared a Form 1120A corporate tax return for Beverly Hills Medical for the tax year 1993, identifying the corporate nominee Marilyn Lange as the 100% owner of Beverly Hills Medical.

32. In or about March 1993, as part of the concealment scheme, Beaudry set up UHL for the benefit of defendants JOHN and LETANTIA BUSSELL. UHL was designed to establish a fraudulent encumbrance on the Stein Eriksen condo by means of the creation of a fictitious loan from UHL to defendants JOHN and LETANTIA BUSSELL. The alleged loan was documented by a promissory note and secured by a deed of trust executed by the BUSSELLS and recorded by Beaudry in April 1993. In fact, by utilizing Rowley's services, as a nominee officer of UHL, who acted solely under Beaudry's direction, defendant JOHN BUSSELL was able covertly to finance and control the alleged lending activities of UHL for his own benefit, directing the transfer of UHL funds to him and depositing the rental income he received from the Stein Eriksen condo directly into UHL's account as repayment of the alleged loan.

33. The purpose of establishing this fraudulent encumbrance on the Stein Eriksen condo was two-fold. First, it enabled defendant JOHN BUSSELL to transfer all his rental income from the Stein Eriksen condo to an alleged third-party creditor, UHL, which was in fact controlled by him, thereby effecting a fraudulent transfer of property in contemplation of bankruptcy. Second, it concealed the BUSSELLS' equity in the Stein Eriksen condo from creditors and from the bankruptcy trustee by substantially inflating the amount of the actual encumbrances on the property. This provided a basis

for UHL eventually to effect a fraudulent foreclosure upon the Stein Eriksen condo, thereby fraudulently removing this asset from the BUSSELLS' bankruptcy estate.

34. Between April 1993 and March 1995, defendant JOHN BUSSELL diverted approximately $111,000 in rental income from the Stein Eriksen Condo to UHL to sustain the fiction that UHL was a bona fide secured creditor of the BUSSELLS, notwithstanding that the BUSSELLS received no more than $42,660 in alleged loan proceeds under the promissory note from UHL during this same time period.

B. FALSE STATEMENTS IN THE BANKRUPTCY FILING

35. Following completion of the required statutory period after which discharge of outstanding federal and state income taxes is permitted (as set forth in paragraph 18 above), on or about March 7, 1995 defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN and Robert Beaudry, commenced the BUSSELL bankruptcy. In so doing, defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, executed under penalty of perjury, and filed and caused to be filed their bankruptcy petition, schedules and statement of financial affairs in which they misrepresented and

failed to disclose their financial condition in the following ways, among others:

a. In response to question no. 12 on Schedule B of their bankruptcy filing, requiring disclosure of stock and interests in incorporated businesses, the BUSSELLS failed to disclose their interests in BBL and Beverly Hills Medical, two of the three corporations through which they operated defendant LETANTIA BUSSELL's dermatology practice. As defendants JOHN and LETANTIA BUSSELL and defendant SHERMAN well knew, the BUSSELLS were the real parties in interest and effectively owned and controlled these two corporations;

b. In response to question no. 2 of their statement of financial affairs, the BUSSELLS falsely represented that between 1993 and 1995 defendant JOHN BUSSELL received approximately $300,000 in disability income, consulting fees and rental income. As defendants JOHN and LETANTIA BUSSELL well knew, defendant JOHN BUSSELL had received in excess of $1.6 million in disability and rental income during this time period;

c. On Schedule A of their bankruptcy filing, requiring disclosure of their interests in real property subject to secured creditors' interests, the BUSSELLS falsely represented that the current market value of their interest in the Stein Eriksen condo was $475,000 subject to a secured creditor interest of $167,344 by UHL. As the BUSSELLS well knew, the

Stein Eriksen condo had a market value substantially in excess of $475,000 and UHL did not have a bona fide secured creditor interest as listed on Schedule A;

d. In response to question no. 9 on their statement of financial affairs, the BUSSELLS falsely represented that the only payments they made for consultation concerning debt consolidation and relief under the bankruptcy law within one year preceding the Bussell bankruptcy was a payment of $2,500 to defendant SHERMAN to cover filing costs and attorney's fees. In truth and in fact, as defendants JOHN and LETANTIA BUSSELL and SHERMAN well knew, the BUSSELLS paid defendant SHERMAN substantially in excess of $2,500 for services concerning debt consolidation and bankruptcy relief during the year preceding the filing of the Bussell bankruptcy; and

e. In response to question no. 17 of their statement of financial affairs, the BUSSELLS falsely represented that they did not engage an accountant or bookkeeper who kept or supervised the keeping of books of account and records or prepared financial statements for them. In truth and in fact, as defendants JOHN and LETANTIA BUSSELL and SHERMAN well knew, the BUSSELLS utilized the services of an accountant who worked with TCG, to provide accounting services for the BUSSELLS and to prepare financial statements for their businesses.

36. In connection with the BUSSELL bankruptcy filing, on or about March 7, 1995,

defendant SHERMAN falsely represented in the statement of attorney compensation that he was paid only $2,340 by the BUSSELLS for legal services rendered in contemplation of and in connection with the Bussell bankruptcy. As defendant SHERMAN well knew, he had provided legal services to the BUSSELLS in contemplation of bankruptcy since 1993 and had been paid substantially in excess of $2,340 for such services.

C. CONCEALMENT OF ASSETS OF THE DEBTORS' ESTATE

Concealment of Interest In BBL and Beverly Hills Medical

37. Beginning on or about March 7, 1995 and continuing to at least February 5, 1996, defendant JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, knowingly and fraudulently concealed from the bankruptcy court, the bankruptcy trustee and creditors of the BUSSELL bankruptcy the BUSSELLS' beneficial ownership interest in BBL and in Beverly Hills Medical through the following means, among others:

a. On or about March 7, 1995, defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant JEFFREY SHERMAN, executed under penalty of perjury, and filed and caused to be filed their bankruptcy petition, schedules and statement of financial affairs in which they fraudulently failed to

disclose their interest in BBL and Beverly Hills Medical in response to the following questions:

i. On Schedule B, where debtors are required to disclose their stock and interests in incorporated businesses, the BUSSELLS knowingly and falsely failed to disclose their interests in BBL and Beverly Hills Medical;

ii. In response to question 16 of the statement of financial affairs, where debtors are required to disclose corporations in which they serve as managing executives, the BUSSELLS knowingly and falsely failed to disclose that they were the managing executives of BBL and Beverly Hills Medical, who made all relevant business and financial decisions for these corporations;

b. On or about July 11, 1995, defendant JOHN BUSSELL stated under oath, in the presence of defendant SHERMAN, that he and defendant LETANTIA BUSSELL maintained a total of three business bank accounts for their medical practice at American Savings, First Pacific and Bank of California, thereby knowingly and fraudulently failing to disclose that he and defendant LETANTIA BUSSELL in fact maintained (1) at least five different business bank accounts in the name of BBL for their medical practice at Sanwa Bank, MBNA America Bank and Wells Fargo Bank with an aggregate balance as of March 7, 1995 of approximately $1,163,744; and (2) one business bank account for their medical practice in an account in the

name of Beverly Hills Medical at First Interstate Bank with a balance of approximately $5,787 as of March 7, 1995;

c. On or about July 11, 1995, defendant JOHN BUSSELL knowingly and falsely stated under oath that he had no assets other than those listed on the Exhibits to his July 11, 1995 sworn examination or disclosed at his July 11, 1995 sworn examination, when, as defendant JOHN BUSSELL well knew, he had additional undisclosed assets, including interests in BBL and Beverly Hills Medical; and

d. On or about February 5, 1996, defendant LETANTIA BUSSELL knowingly and falsely stated under oath that, aside from L.B. Bussell, she was not actively involved with any other corporations, other than on a passive investment basis, when, as defendant LETANTIA BUSSELL well knew, she was actively involved in the management and operation of two corporations through which she conducted her dermatology practice, including Beverly Hills Medical.

Concealment of Interest In Stein Eriksen Condo

38. Beginning on or about March 7, 1995 and continuing to at least on or about August 22, 1995, defendant JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN and Robert Beaudry, knowingly and fraudulently concealed from the bankruptcy court, the bankruptcy trustee and creditors in the BUSSELL bankruptcy, the

BUSSELLS' equity interest in the Stein Eriksen condo through the following means, among others:

a. On or about March 7, 1995, on Schedule A of their bankruptcy filing, the BUSSELLS knowingly and falsely represented that the current market value of their interest in the Stein Eriksen condo was $475,000 subject to UHL's secured creditor interest of $167,344, when, as the BUSSELLS well knew, the Stein Eriksen condo had a market value substantially in excess of $475,000 and UHL did not have a bona fide secured creditor interest as represented;

b. On or about April 14, 1995, defendant JOHN BUSSELL knowingly and falsely stated under oath, in the presence of defendant LETANTIA BUSSELL, that their prior representation in their bankruptcy filing that the market value of the Stein Eriksen condo was $475,000 was based upon a market analysis from a real estate broker dealing in the Park City, Utah area, when, as defendant JOHN BUSSELL well knew, there was no such market analysis;

c. On or about April 19, 1995, after the Bussell bankruptcy had been filed, defendant SHERMAN and Beaudry caused a "Motion for Relief from the Automatic Stay under 11 U.S.C. § 362 (Real Property)" to be filed on behalf of UHL in the Busssell bankruptcy to enable UHL to proceed with the fraudulent foreclosure on the Stein Eriksen condo;

d. On or about May 31, 1995, defendant JOHN BUSSELL knowingly and falsely stated under oath that the market value of the Stein Eriksen condo was between $475,000 and $500,000 and the indebtedness on the property was $500,000, when as defendant JOHN BUSSELL well knew, the market value of the property was higher and the indebtedness was lower; and

e. On or about July 11, 1995, defendant JOHN BUSSELL knowingly and falsely stated under oath that he was in arrears on his mortgage on the Stein Eriksen condo for around a year prior to filing bankruptcy, when, as defendant JOHN BUSSELL well knew, he was not in arrears and his alleged lender, UHL, was not a bona fide creditor.

OVERT ACTS

39. In furtherance of the conspiracy and to effect the objects thereof, the defendants JOHN BUSSELL, LETANTIA BUSSELL and JEFFREY SHERMAN, and Robert Beaudry committed and caused to be committed various overt acts in the Central District of California and elsewhere, among which were the following:

Act 1. On or about June 17, 1992, Robert Beaudry filed articles of incorporation in the state of California for BBL, listing Assieh Ghassemi as the owner and principal officer of BBL.

Act 2. In or about July 1992, defendant LETANTIA BUSSELL requested Ghassemi, an employee of her dermatology practice, to sign documents reflecting that Ghassemi was to serve as the principal corporate officer and owner of BBL. In instructing Ghassemi to sign corporate documents for BBL, defendant LETANTIA BUSSELL explained that she was forming this corporation, BBL, and naming Ghassemi as its officer and owner, in order to protect her dermatology practice in the event that something happened to her.

Act 3. In or about July 1992, defendant LETANTIA BUSSELL requested Marilyn Lange, a family friend, to sign some papers reflecting that she would serve as the owner and officer of a business corporation set up for the benefit of the BUSSELLS. In instructing Lange to sign corporate documents reflecting Lange's ownership of the BUSSELLS' corporation, defendant LETANTIA BUSSELL explained that she wanted Lange to serve as the owner and officer of public record for this corporation to maintain the integrity of the corporation in the event that something happened to her.

Act 4. On or about February 16, 1993, Beaudry filed articles of incorporation in the state of California for Beverly Hills Medical, listing Marilyn Lange as the owner and principal officer of the corporation.

Act 5. On or about March 5, 1993, Beaudry caused Derek Rowley to file articles of incorporation

in the state of Utah for UHL, naming Derek Rowley as the sole director of UHL.

Act 6. On or about April 2, 1993, defendants JOHN and LETANTIA BUSSELL executed a promissory note obligating them to repay with interest an alleged loan of $60,000 they were supposed to have received from UHL.

Act 7. On or about March 1994, defendant SHERMAN met with an accountant working with TCG, to explain the three-tier structure of corporations involving BBL, Beverly Hills Medical and L.B. Bussell, through which defendant LETANTIA BUSSELL operated her dermatology practice, so that the accountant could provide accounting and tax preparation services for these corporations.

Act 8. On or about March 14, 1994, defendant SHERMAN signed a check payable to the Internal Revenue Service in the amount of $3,500 for payment of 1993 Form 7004 corporate taxes for Beverly Hills Medical.

Act 9. On or about June 1, 1994, defendant SHERMAN prepared a Form 1120A corporate tax return for Beverly Hills Medical for the tax year 1993, identifying Marilyn Lange as the 100% owner of Beverly Hills Medical.

Act 10. On or about February 21, 1995, defendant SHERMAN telephoned an attorney to arrange for the preparation and filing on behalf of UHL of a motion for relief from the automatic stay

resulting from the contemplated Bussell bankruptcy in order to enable UHL to prosecute a fraudulent foreclosure on the Stein Eriksen condo following the filing of the Bussell bankruptcy.

Act 11. On or about February 21, 1995, defendant SHERMAN caused to be delivered to this attorney a check for $750 to pay attorney's fees for his rendering of services in connection with the preparation and filing of the motion for relief from stay on behalf of UHL.

Act 12. On or about March 7, 1995, defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, executed under penalty of perjury, and filed and caused to be filed with the Bankruptcy Court, their bankruptcy petition, schedules and statement of financial affairs, in which they knowingly and fraudulently made material false statements.

Act 13. On or about March 7, 1995, defendant SHERMAN submitted a false statement in connection with the BUSSELLS' bankruptcy filing, in which he falsely and fraudulently represented that he was paid only $2,340 by the BUSSELLS for legal services rendered in contemplation of and in connection with the Bussell bankruptcy.

Act 14. On or about March 16, 1995, defendant SHERMAN caused to be deposited a check for $2000 made payable to defendant SHERMAN, which was issued by Beaudry as payment for defendant SHERMAN's assistance in preparing and filing on

behalf of UHL the motion for relief from stay against the BUSSELLS.

Act 15. On or about April 14, 1995, defendant JOHN BUSSELL knowingly and falsely made material false oaths and accounts in his sworn examination in bankruptcy court concerning the accuracy of the statements on the BUSSELLS' March 7, 1995 bankruptcy filing and the basis of their claim that the Stein Eriksen condo had a market value of $475,000.

Act 16. On or about May 31, 1995, defendant JOHN BUSSELL knowingly and falsely made a material false oath and account in his sworn examination in bankruptcy court concerning the market value of the Stein Eriksen condo and the amount of indebtedness on that property.

Act 17. On or about July 11, 1995, defendant JOHN BUSSELL knowingly and falsely made material false oaths and accounts in his sworn examination in bankruptcy court concerning the completeness of his disclosure of the BUSSELLS' assets and the length of time that mortgage on the Stein Eriksen condo was in arrears prior to the filing of the Bussell bankruptcy.

Act 18. On or about January 22, 1996, defendant JOHN BUSSELL caused $1,149,048 in funds maintained in the Sanwa account to be transferred to a brokerage account at Paine Webber, which he opened in the name of BBL through a

broker dealer in Beverly Hills, California called SSI Investment Management Company, Inc.

Act 19. On or about February 5, 1996, defendant LETANTIA BUSSELL testified falsely under oath in a deposition in a federal civil action, *Provident Life and Accident Insurance Company and John Hancock Mutual Life Insurance Company v. John Bussell, MD,* Nos. CV 94-1756 and 94-5987-RAP, in that defendant LETANTIA BUSSELL stated that other than L.B. Bussell she was not actively involved with any other corporations.

COUNTS TWO THROUGH FOUR

[JOHN BUSSELL, LETANTIA BUSSELL, JEFFREY SHERMAN]

[18 U.S.C. § 152(1), 2]

40. The Grand Jury hereby repeats and realleges paragraphs 1 through 23 and 27 through 38, as fully set forth herein.

41. Beginning on or about March 7, 1995 and continuing through at least on or about August 22, 1995, within the Central District of California, defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, and others known and unknown to the Grand Jury, knowingly and fraudulently concealed or caused to be concealed from the bankruptcy trustee, the creditors of the Bussell bankruptcy and the United States Trustee the following property belonging to the bankruptcy

estate in "*In re John Bussell and Letantia Bussell, Debtors*," case no. LA 95-15967-TD:

COUNT	CONCEALED ASSET
TWO	The Estate's beneficial ownership interest in BBL, which included its interest in a bank account in the name of "BBL" at Sanwa Bank, West Los Angeles Main Office, with balance of $949,048 as of 3/7/95
THREE	The Estate's beneficial ownership interest in Beverly Hills Medical, which included its interest in a bank account in the name of "Beverly Hills Medical" at First Interstate Bank, Beverly Hills Branch #156, with balance of $5,787 as of 3/7/95
FOUR	The Estate's equity in the Stein Eriksen condo

COUNT FIVE

[JOHN BUSSELL, LETANTIA BUSSELL, JEFFREY SHERMAN]

[18 U.S.C. §§ 152(3), 2]

42. The Grand Jury hereby repeats and realleges paragraphs 1 through 23 and 27 through 38, as fully set forth herein.

43. On or about March 7, 1995, in the Central District of California, defendants JOHN and

LETANTIA BUSSELL, aided and abetted by *defendant* SHERMAN, *and others known and* unknown to the Grand Jury, knowingly and fraudulently made a false declaration and statement as to a material matter, under penalty of perjury, as defined under Section 1746 of Title 28, United States Code, in and in relation to a case under Title 11, "*In re John Bussell and Letantia Bussell, Debtors*," case no. LA 95-15967-TD, by submitting Schedules of Assets and Liabilities in which defendants JOHN and LETANTIA BUSSELL made the following false statements:

(1) fraudulently omitted to disclose their interests in two corporations, BBL and Beverly Hills Medical; and

(2) falsely stated that their interest in the Stein Eriksen condo had a market value of $475,000, subject to secured creditors' interests of $479,812.69, when in truth and in fact, as defendants well knew, the market value of the Stein Eriksen condo was higher and the secured creditors interests were lower.

COUNT SIX

[JOHN BUSSELL, LETANTIA BUSSELL, JEFFREY SHERMAN]

[18 U.S.C. §§ 152(3), 2]

44. The Grand Jury hereby repeats and realleges paragraphs 1 through 23 and 27 through 38, as fully set forth herein.

45. On or about March 7, 1995, in the Central District of California, defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, and others known and unknown to the Grand Jury, knowingly and fraudulently made a false declaration and statement as to a material matter under penalty of perjury, as defined under section 1746 of Title 28, United States Code, in and in relation to a case under Title 11, "*In re John Bussell and Letantia Bussell, Debtors*," case no. LA 95-15967-TD, by submitting a Statement of Financial Affairs in which defendants JOHN and LETANTIA BUSSELL made the following false statements:

(1) falsely represented that between 1993 and 1995 defendant JOHN BUSSELL had disability, rental and consulting income of approximately $304,000, when, in truth and in fact, as defendants well knew, defendant JOHN BUSSELL had combined disability and rental income during this period substantially in excess of that amount;

(2) falsely stated that within one year prior to commencement of their bankruptcy they paid defendant SHERMAN $2,340 in fees for consultation services concerning debt consolidation and preparation of a petition in bankruptcy, when, in truth and in fact, as defendants well knew, they had paid defendant SHERMAN substantially in excess of that amount during that period;

(3) fraudulently omitted to disclose that they served as managing executives of two corporations, BBL and Beverly Hills Medical; and

(4) falsely stated that they did not have an accountant within the last two years who maintained books and records and prepared financial statements for them, when, in truth and in fact, as defendants well knew, they used the services of an accountant who worked with TCG to perform accounting services and prepare financial statements for them.

* * *

COUNT ELEVEN

[LETANTIA BUSSELL]

[18 U.S.C. § 152(2)]

50. The Grand Jury hereby repeats and realleges paragraphs 1 through 23 and 27 through 38, as fully set forth herein.

51. On March 18, 1994, a civil action was filed in *Provident Life and Accident Insurance Company and John Hancock Mutual Life Insurance Company v. John Bussell, MD,* Nos. CV 94-1756 and 94-5987-RAP ("the Provident Life action"), in which plaintiffs Provident Life and Accident Insurance Company ("Provident") and John Hancock Mutual Life Insurance Company ("John Hancock") asserted claims against defendant JOHN BUSSELL for declaratory

judgment and restitution to determine whether JOHN BUSSELL was totally disabled under his disability insurance policies and whether plaintiffs were entitled to restitution based upon JOHN BUSSELL'S alleged fraudulent insurance claims.

52. After the Bussell bankruptcy was filed, Provident and John Hancock also commenced an adversary proceeding on June 13, 1995 in the United States Bankruptcy Court for the Central District of California, *Provident Life and Accident Insurance Co., et. al. v. John A. Bussell, M.D.*, bearing adversary case number AD 95-02723, (the "Bussell adversary case"). An adversary proceeding is an action initiated within the bankruptcy case in which a complaining party, usually a creditor, seeks affirmative relief from the debtor who has commenced the bankruptcy case. In the Bussell adversary case, the complaining parties, Provident Life and Accident Insurance Co. and John Hancock Mutual Life Insurance Co., alleged that their claims against defendant JOHN BUSSELL in the Provident Life action were not dischargeable in bankruptcy because they were induced by fraud.

53. The Provident Life action was related to the Bussell adversary case in that the Provident Life action adjudicated the merits of Provident's and John Hancock's claims against defendant JOHN BUSSELL, after which the Bussell adversary case then proceeded to determine whether these same claims, if meritorious, were dischargeable in bankruptcy.

54. On or about February 5, 1996, within the Central District of California, defendant LETANTIA BUSSELL did knowingly make and cause to be made a false oath and account in relation to a case under Title 11, namely, *Provident Life and Accident Insurance Co. et. al. v. John A. Bussell, M.D.*, adversary case number AD 95-02723, commenced in United States Bankruptcy Court for the Central District of California, by stating under oath in the Provident Life action that, aside from L.B. Bussell, she was not actively involved with any other corporations, other than on a passive investment basis, when, in truth and in fact, as defendant LETANTIA BUSSELL then well knew, she was actively involved with two other corporations, including Beverly Hills Medical, through which she operated her dermatology practice.

COUNT TWELVE

[JOHN BUSSELL, LETANTIA BUSSELL AND JEFFREY SHERMAN]

[26 U.S.C. § 7201, 18 U.S.C. § 2]

55. The Grand Jury hereby repeats and realleges paragraphs 1 through 23, 27 through 38, 41, 43, 45, 47, and 49, as fully set forth herein.

56. Beginning in or about June 1992, and continuing until at least August 22, 1995, in the Central District of California, defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, and others known and

unknown to the Grand Jury, did willfully attempt to evade and defeat the payment of a substantial portion of the income tax due and owing by defendants JOHN and LETANTIA BUSSELL to the United States of America for the calendar years 1983, 1984, 1986, and 1987, in the total amount of $353,394, by fraudulently causing the bankruptcy court to discharge the aforementioned tax debt on August 22, 1995 as a result of the filing of the Bussell bankruptcy.

57. Defendants JOHN and LETANTIA BUSSELL, aided and abetted by defendant SHERMAN, and others known and unknown to the Grand Jury, caused the fraudulent discharge of the aforementioned income tax debt, thereby evading payment of the aforementioned tax debt, by engaging in the following acts, among others:

a. Knowingly and fraudulently concealing or causing to be concealed from the bankruptcy court, the bankruptcy trustee, and creditors of the Bussell bankruptcy, including the Internal Revenue Service, assets belonging to the bankruptcy estate, specifically, the estate's beneficial ownership interest in BBL; the estate's beneficial ownership interest in Beverly Hills Medical; and the estate's equity in the Stein Eriksen condo, as set forth in paragraphs 37, 38 and 41, above;

b. Knowingly and fraudulently making false declarations and statements as to material matters, under penalty of perjury, as defined under

Section 1746 of Title 28, United States Code, in and in relation to the Bussell bankruptcy, as set forth in paragraphs 35, 36, 43 and 45, above;

c. Knowingly and fraudulently making false oaths and accounts in and in relation to the Bussell bankruptcy, as set forth in paragraphs 47 and 49, above; and

d. Knowingly and fraudulently concealing property in contemplation of filing bankruptcy, as set forth in paragraphs 27 through 34, above.

* * *

COUNT SEVENTEEN

[JOHN BUSSELL AND LETANTIA BUSSELL]

[26 U.S.C. § 7201, 18 U.S.C. § 2]

64. The Grand Jury hereby repeats and realleges paragraphs 1 through 23 and 27 through 38, as fully set forth herein.

65. On or about February 26, 1998, in the Central District of California, defendants JOHN and LETANTIA BUSSELL, each being a resident of Los Angeles, California, and being married to one another during the calendar year 1996, did willfully attempt to evade and defeat the assessment of a large part of the income tax due and owing by them to the United States of America for the calendar year of 1996, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, on

behalf of themselves, which was filed with the Internal Revenue Service. Specifically, in the return the BUSSELLS stated that their joint taxable income for the calendar year 1996 was the sum of $311,834 and that the amount of tax due and owing thereon was the sum of $98,532, whereas, as defendants JOHN and LETANTIA BUSSELL then and there well knew and believed, their joint taxable income for the calendar year 1996 was the sum of $1,485,801, upon which said joint taxable income there was owing to the United States of America an income tax of $563,618.

_____

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No. 07-1262

In the Supreme Court of the United States

LETANTIA BUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. *Whether, absent fundamental ambiguity in the* question, a false statement conviction may be based on a jury's determination that the defendant gave a knowingly false answer to the question as she understood it.

2. Whether the district court's restitution order was authorized under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663 (2000 & Supp. V 2005).

3. Whether petitioner's Sixth Amendment rights were violated when the district court, in determining petitioner's sentence, purportedly relied in part on conduct underlying a charge on which the jury had returned a verdict of not guilty.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Ashworth v. *United States*, 128 S. Ct. 1738 (2008) ... 22, 23
Bronston v. *United States*, 409 U.S. 352 (1973) 12
Hughey v. *United States*, 495 U.S. 411 (1990) 7, 14, 20
Hurn v. *United States*, 128 S. Ct. 1737 (2008) 23
Mercado v. *United States*, 128 S. Ct. 1736 (2008) 22, 23
Oregon v. *Ice*, petition for cert. granted, No. 07-901 (Mar. 17, 2008) 23
Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994) 12
United States v. *Adams*, 363 F.3d 363 (5th Cir. 2004) 18, 19
United States v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) 5
United States v. *Ashworth*, 247 Fed. Appx. 409 (4th Cir. Sept. 6, 2007), cert. denied, 128 S. Ct. 1738 (2008) 23
United States v. *Bennett*, 943 F.2d 738 (7th Cir. 1991), cert. denied, 504 U.S. 987 (1992) 18, 20

Cases—Continued: Page

United States v. *Berger*, 251 F.3d 894 (10th Cir. 2001) . . . 19
United States v. *Bollin*, 264 F.3d 391 (4th Cir.), cert. denied, 534 U.S. 935 (2001), and 535 U.S. 989 (2002) . . 10
United States v. *Booker*, 543 U.S. 220 (2005) 22
United States v. *Booth*, 309 F.3d 566 (9th Cir. 2002) 21
United States v. *Boyd*, 222 F.3d 47 (2d Cir. 2000) 21
United States v. *Bryan*, 58 F.3d 933 (4th Cir. 1995) 10
United States v. *Camper*, 384 F.3d 1073 (9th Cir. 2004), cert. denied, 546 U.S. 827 (2005) 12
United States v. *Ceccerelli*, 350 F. Supp. 475 (W.D. Pa. 1972) 11
United States v. *Chaney*, 964 F.2d 437 (5th Cir. 1992) 19, 20, 21
United States v. *Chapin*, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975) 9, 11
United States v. *Console*, 13 F.3d 641 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994) . . 18
United States v. *Culliton*, 328 F.3d 1074 (9th Cir. 2003), cert. denied, 540 U.S. 1111 (2004) 5, 6, 8
United States v. *Damrah*, 412 F.3d 618 (6th Cir. 2005) . . . 9
United States v. *DeZarn*, 157 F.3d 1042 (6th Cir. 1998) 12
United States v. *Dorcely*, 454 F.3d 366 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006) 23
United States v. *Duncan*, 400 F.3d 1297 (11th Cir.), cert. denied, 546 U.S. 940 (2005) 23
United States v. *Farias*, 469 F.3d 393 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007) 23

Cases—Continued: Page

United States v. *Farmer*, 137 F.3d 1265 (10th Cir. 1998) 9
United States v. *Feldman*, 338 F.3d 212 (3d Cir. 2003) ... 6
United States v. *Foley*, 508 F.3d 627 (11th Cir. 2007) 21
United States v. *Frith*, 461 F.3d 914 (7th Cir. 2006) 17
United States v. *George*, 403 F.3d 470 (7th Cir.), cert. denied, 546 U.S. 1008 (2005) 18
United States v. *Gobbi*, 471 F.3d 302 (1st Cir. 2006) 23
United States v. *Gordon*, 480 F.3d 1205 (10th Cir. 2007) 19
United States v. *Grice*, 319 F.3d 1174 (9th Cir.), cert. denied, 539 U.S. 950 (2003) 13, 17
United States v. *Gunther*, No. 96-4804, 1998 WL 29259 (4th Cir. Jan. 28, 1998) 10
United States v. *Hatch*, 434 F.3d 1 (1st Cir. 2006) 8
United States v. *Heater*, 63 F.3d 311 (4th Cir. 1995), cert. denied, 516 U.S. 1083 (1996) 10
United States v. *Hensley*, 91 F.3d 274 (1st Cir. 1996) 19, 20
United States v. *High Elk*, 442 F.3d 622 (8th Cir. 2006) 23
United States v. *Hurn*, 496 F.3d 784 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008) 23
United States v. *Jeffery*, No. 93-6295, 1994 WL 468099 (10th Cir. Aug. 25, 1994), cert. denied, 513 U.S. 1196 (1995) 19
United States v. *Jimenez*, 513 F.3d 62 (3d Cir.), cert. denied, No. 07-1291, 2008 WL 1751518 (May 12, 2008) 23

Cases—Continued: Page

United States v. *Kane*, 944 F.2d 1406 (7th Cir. 1991) 16
United States v. *Lighte*, 782 F.2d 367 (2d Cir. 1986) ... 9, 10
United States v. *Magallanez*, 408 F.3d 672 (10th Cir.), cert. denied, 546 U.S. 955 (2005) 23
United States v. *Manapat*, 928 F.2d 1097 (11th Cir. 1991) 9
United States v. *Martellano*, 675 F.2d 940 (7th Cir. 1982) 9
United States v. *Mendez*, 498 F.3d 423 (6th Cir. 2007) ... 23
United States v. *Mercado*, 474 F.3d 654 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008) 23
United States v. *Milkiewicz*, 470 F.3d 390 (1st Cir. 2006) 21
United States v. *Pedroni*, 45 Fed. Appx. 103 (3d Cir.), cert. denied, 537 U.S. 1045 2002) 18
United States v. *Polichemi*, 219 F.3d 698 (7th Cir.), cert. denied, 531 U.S. 933 (2000), and 531 U.S. 1168 (2001) 17
United States v. *Race*, 632 F.2d 1114 (4th Cir. 1980) 9
United States v. *Randle*, 324 F.3d 550 (7th Cir. 2003) ... 17
United States v. *Reed*, 80 F.3d 1419 (9th Cir.), cert. denied, 519 U.S. 882 (1996) 8, 20
United States v. *Robbins*, 997 F.2d 390 (8th Cir.), cert. denied, 510 U.S. 948 (1993) 9
United States v. *Ryan*, 828 F.2d 1010 (3d Cir. 1987) .. 9, 13
United States v. *Thompson*, 637 F.2d 267 (5th Cir. 1981) 9
United States v. *Turino*, 978 F.2d 315 (7th Cir. 1992), cert. denied, 508 U.S. 975 (1993) 18, 20

Cases—Continued: Page

United States v. *Vaughn*, 430 F.3d 518 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006) 23
United States v. *Walker*, 9 F.3d 1245 (7th Cir. 1993), cert. denied, 511 U.S. 1096 (1994) 20
United States v. *Watts*, 519 U.S. 148 (1997) 22
United States v. *White*, 503 F.3d 487 (6th Cir. 2007) 23

Constitution and statutes:

U.S. Const. Amend. VI 14, 23
Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A 13
Victim and Witness Protection Act of 1982, 18 U.S.C. 3663 (2000 & Supp. V 2005) 14
18 U.S.C. 3663(a)(1)(A) (Supp. V 2005) 14
18 U.S.C. 3663(a)(2) 14, 15
18 U.S.C. 3664 (2000 & Supp. V 2005) 13
Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4863 14
18 U.S.C. 2 4
18 U.S.C. 152(1) 4
18 U.S.C. 152(2) 4
18 U.S.C. 152(3) 4
18 U.S.C. 371 4
18 U.S.C. 1001 9
18 U.S.C. 1621 12
26 U.S.C. 7201 4

In the Supreme Court of the United States

No. 07-1262

LETANTIA BUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-29a) is reported at 504 F.3d 956. The prior opinion of the court of appeals (Pet. App. 30a-55a) is reported at 414 F.3d 1048. The various orders of the district court (Pet. App. 56a-116a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007. A petition for rehearing was denied on December 5, 2007 (Pet. App. 119a-120a). On February 22, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 3, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Central District of California on multiple counts of bankruptcy fraud and tax evasion. The court of appeals affirmed petitioner's convictions but remanded for resentencing. Pet. App. 30a-55a. On remand, the district court sentenced petitioner to 36 months of imprisonment and ordered restitution in the amount of $2,284,172.87. The court of appeals affirmed in part and reversed and remanded in part. *Id.* at 1a-29a.

1. a. Petitioner was a practicing dermatologist. Her late husband was an anaesthesiologist. In 1992, facing mounting tax and bank debts, the couple hired two attorneys to assist in pre-bankruptcy planning. Pet. App. 2a-3a; Gov't C.A. Br. 5.

Upon the attorneys' advice, petitioner reorganized her dermatology practice into three separate corporations: BBL Medical Management, Inc. (BBL), Beverly Hills Dermatology Medical Corp. (Beverly Hills Medical) and L.B. Bussell, MD Inc. (L.B. Bussell). BBL and Beverly Hills Medical were held in the names of nominee owners. Petitioner was the owner and officer of record for L.B. Bussell. BBL received the practice's gross receipts, paid expenses and overhead, and retained the profits of the business. The second corporation, Beverly Hills Medical, served as a conduit through which petitioner transferred between 10% and 20% of BBL's profits to the third corporation, L.B. Bussell, which paid petitioner an artificially reduced salary. Pet. App. 3a; Gov't C.A. Br. 9-10. The attorneys also helped petitioner and her husband set up various corporations to conceal ownership of a Utah condominium, a San Diego

farm, and receipt of disability insurance income. Pet. App. 3a-4a; Gov't C.A. Br. 12-15.

b. On March 7, 1995, petitioner and her husband filed a joint bankruptcy petition. Petitioner reported total assets of approximately $1.8 million and total liabilities exceeding $4.6 million. Pet. App. 4a. Petitioner failed to disclose her interests in BBL and Beverly Hills Medical. Gov't C.A. Br. 16-17. Specifically, petitioner omitted mention of either entity in her responses to Question 12 on Schedule B (requiring debtor to list "[s]tock and interests in incorporated and unincorporated businesses"), Question 33 of Schedule B (requiring disclosure of "[o]ther personal property of any kind not already listed"), and Question 16 of the Statement of Financial Affairs (requiring debtor to "list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation"). Pet. App. 133a-139a.

Petitioner and her husband also failed to disclose the true market value of the Utah condo, thereby concealing their interest in $500,000 in equity in that property, as well as additional assets that they had fraudulently transferred to nominee owners or concealed. Gov't C.A. Br. 17-18.

In August 1995, the bankruptcy court discharged all their scheduled debts, except a claim by Provident Life Insurance Company in pending litigation, in the amount of $2,293,527.09. Pet. App. 4a.

2. In 2000, a grand jury returned a 17-count indictment charging petitioner, her husband, and one of their former attorneys with various fraud-related offenses. At trial, petitioner and her husband argued that they acted in good faith and relied on the advice of their lawyers. Pet. App. 4a.

The jury found petitioner guilty of conspiracy to conceal assets in contemplation of bankruptcy, to make false statements in the bankruptcy, and to conceal assets of the bankruptcy estate, in violation of 18 U.S.C. 371 (Count 1); concealing an ownership interest in BBL (Count 2) and in Beverly Hills Medical (Count 3), in violation of 18 U.S.C. 152(1) and (2); making false statements in the bankruptcy petition, including omission of interests in BBL and Beverly Hills Medical (Count 5) and omission of involvement as managing executives of those entities (Count 6), in violation of 18 U.S.C. 2 and 18 U.S.C. 152(3); and willfully attempting to evade a substantial portion of income tax owed for tax years 1983-1987, in violation of 26 U.S.C. 7201 (Count 12). The jury found petitioner not guilty of concealing ownership of the Utah condo (Count 4); making a false oath and account that she was not actively involved with any corporations other than L.B. Bussell, except on a passive investment basis (Count 11); and willfully attempting to evade a substantial portion of income tax owed for 1996 (Count 17). Pet. App. 4a-5a, 33a.[1]

3. At petitioner's original sentencing, the district court agreed with the recommendations of the Presentence Report (PSR paras. 77-81) and increased the offense level by 13 levels, based on a finding that petitioner's intended loss equaled $3,057,927.09, the full amount of debt petitioner attempted to discharge in bankruptcy. The district court agreed with the government that, given petitioner's true financial position, she would have been able to pay her debts and would not have obtained bankruptcy relief if she had not engaged

[1] While the jury was deliberating, petitioner's husband fell to his death from his hotel room. Pet. App. 4a. Petitioner's former attorneys entered into plea agreements with the government. *Id.* at 5a.

in the conspiracy to conceal her assets. Pet. App. 5a; Gov't C.A. Br. 21-22.

The district court imposed a mid-range Guidelines sentence of 36 months. The district court also ordered restitution of $2,393,527, which equaled the amount of debt actually discharged in bankruptcy, plus an unpaid settlement of $100,000 to Provident for a debt petitioner did not succeed in discharging. The district court assessed costs of prosecution of $62,614, and imposed a $50,000 fine. Pet. App. 5a-6a.

4. The court of appeals affirmed petitioner's convictions, vacated the restitution and cost orders, and ordered a limited remand pursuant to *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). Pet. App. 30a-55a.

As relevant here, petitioner argued that the district court erred by submitting to the jury the charges based on answers to Question 12 from Schedule B and Question 16 from the Statement of Financial Affairs because, according to petitioner, they were "fundamentally ambiguous" questions. Pet. C.A. Br. 40-48 (No. 02-50495). Petitioner also argued that the evidence was insufficient to prove that petitioner's answers to the relevant questions were false as she understood the questions. The court of appeals rejected both arguments. The court explained that, although the answer to a "fundamentally ambiguous" question may not as a matter of law form the basis of a false statement prosecution, "we do not invalidate a conviction 'simply because the questioner and respondent might have different interpretations' of the relevant questions." Pet. App. 44a (quoting *United States* v. *Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003), cert. denied, 540 U.S. 1111 (2004)). Rather, the court of appeals explained, it examines "the context of the ques-

tion and answers, as well as other extrinsic evidence, to determine whether the respondent provided false answers to the questions 'as he understood [them].'" *Id.* at 44a-45a (quoting *Culliton*, 328 F.3d at 1079). The court thereafter concluded that the evidence showed that petitioner provided knowingly false answers by failing to disclose her interest and management role in BBL and Beverly Hills Medical. *Id.* at 45a-47a.

With respect to sentencing, the court of appeals deferred consideration of petitioner's challenges to the loss amount and remanded the case pursuant to *Ameline* for the district court to consider whether it would have imposed a materially different sentence had it known that the Guidelines were only advisory. Pet. App. 53a. The court also vacated the restitution order and remanded for the district court "to determine the actual losses caused by [petitioner's] fraudulent conduct—that is, to compare 'what actually happened with what would have happened if [she] had acted lawfully.'" *Id.* at 54a-55a (second set of brackets in original) (quoting *United States* v. *Feldman*, 338 F.3d 212, 220-221 (3d Cir. 2003)).

5. On remand, the district court declined to reopen the sentencing proceedings, finding that the 36-month sentence imposed was "just and reasonable" and that it would not have imposed a materially different sentence under an advisory Guidelines regime. Pet. App. 88a. The court essentially reaffirmed its approximately $2.3 million restitution order, finding that, based on petitioner's count 1 conspiracy conviction, petitioner "caused actual losses" to victims in the total amount of the bankruptcy debt scheduled to be discharged. *Id.* at 89a.

6. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-29a.

The court upheld petitioner's 36-month term of imprisonment, rejecting petitioner's various challenges to the district court's calculation of the loss amount under the Guidelines, including her claim that the loss amount should not include equity in the Utah condo because she was acquitted of concealing that equity. Pet. App. 6a-15a. The court of appeals noted that "[t]he district court is entitled to take into account all relevant conduct, charged and uncharged," in sentencing a defendant. *Id.* at 12a n.8.

The court of appeals also affirmed the restitution order. The panel rejected petitioner's challenge to the methodology used by the district court to calculate actual loss. The panel upheld the district court's determination "that the value of the assets exceeded the debts to be discharged and therefore the actual loss to the creditors equaled the amount of debt actually discharged in the bankruptcy." Pet. App. 20a.

In addition, the court of appeals rejected petitioner's argument that, under *Hughey* v. *United States*, 495 U.S. 411 (1990), the district court could order restitution based only on the specific assets she was convicted of concealing in count 2 (her interest in BBL) and count 3 (her interest in Beverly Hills Medical). Pet. App. 20a-21a. The court of appeals held that *Hughey* was "of no avail to [petitioner] because, after *Hughey* was decided, Congress amended the VWPA by expanding the definition of 'victim,' in part to overrule that decision." *Id.* at 21a. The court of appeals reasoned that, "'[u]nder the amended statute, when someone is convicted of a crime that includes a scheme, conspiracy, or pattern of criminal activity *as an element* of the offense, the court can order restitution for losses resulting from any conduct that was part of the scheme, conspiracy, or pattern of

criminal activity.'" *Id.* at 22a (quoting *United States* v. *Reed*, 80 F.3d 1419, 1423 (9th Cir.), cert. denied, 519 U.S. 882 (1996)). Because petitioner "was convicted of a crime that included a conspiracy 'as an element of the offense,'" the court of appeals concluded, "the district court did not err in considering all of the concealed assets for purposes of determining the actual loss to the bankruptcy creditors." Pet. App. 22a-23a.[2]

ARGUMENT

1. Petitioner asserts (Pet. 13-24) that there is a circuit conflict on whether a false statement conviction may be based on the answer to a question, absent fundamental ambiguity, as long as the jury finds that the defendant falsely answered the question as she understood it. There is no square conflict, petitioner did not argue for a contrary rule below, and the court of appeals' rule (as applied here) comports with due process. Petitioner's claim thus warrants no further review.

a. The court of appeals applied its rule that a jury should determine whether the defendant gave a false answer to the question as she understood it, unless the question is so "fundamentally ambiguous" that "men of ordinary intelligence cannot arrive at a mutual understanding of its meaning." *United States* v. *Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003) (internal quotation marks omitted), cert. denied, 540 U.S. 1111 (2004). Petitioner does not dispute that all the other circuit courts, with the lone exception of the Fourth Circuit, agree with the Ninth Circuit. See *United States* v. *Hatch*, 434 F.3d 1,

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[2] The court of appeals reversed in part and remanded, based on its ruling that certain trust deeds should have been reconveyed to petitioner when the court of appeals vacated the original sentencing order. Pet. App. 27a-29a.

5 (1st Cir. 2006); *United States* v. *Damrah*, 412 F.3d 618, 626 (6th Cir. 2005); *United States* v. *Farmer*, 137 F.3d 1265, 1268-1269 (10th Cir. 1998); *United States* v. *Robbins*, 997 F.2d 390, 395 (8th Cir.), cert. denied, 510 U.S. 948 (1993); *United States* v. *Manapat*, 928 F.2d 1097, 1099-1100 (11th Cir. 1991); *United States* v. *Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987); *United States* v. *Lighte*, 782 F.2d 367, 372-373 (2d Cir. 1986); *United States* v. *Martellano*, 675 F.2d 940, 942 (7th Cir. 1982); *United States* v. *Thompson*, 637 F.2d 267, 270 (5th Cir. 1981); *United States* v. *Chapin*, 515 F.2d 1274, 1279-1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

Petitioner alleges (Pet. 15-16) a circuit conflict based on the Fourth Circuit's decision in *United States* v. *Race*, 632 F.2d 1114, 1120 (1980). A review of cases from the Fourth Circuit, however, shows that there is no square conflict. In *Race*, the Fourth Circuit held that the defendants could not be prosecuted under 18 U.S.C. 1001 for submitting false and fraudulent invoices to the government, when those invoices were submitted pursuant to an arguably ambiguous contractual provision. The court reasoned that the contractual language could not support the government's construction but added that, even if the contractual language were ambiguous, the result would have been the same. 632 F.2d at 1119-1120. The court noted, however, that there was no evidence in that case to support a finding that the defendants had acted in bad faith in seeking reimbursement (*e.g.*, by construing the contractual language as the government did). *Id.* at 1120-1121. Petitioner cites no Fourth Circuit case holding that a defendant could not be prosecuted for perjury for making a false statement when, even if the question was somewhat ambiguous,

there was evidence that the defendant understood the question as the government did.

Further, in more recent cases, the Fourth Circuit has relied on the rule that a prosecution for perjury is foreclosed only if the question is "fundamentally ambiguous." See *United States* v. *Heater*, 63 F.3d 311, 327 (1995) ("In this case * * * we find no 'fundamental ambiguity' that would have required the district court to remove the questions from the jury's consideration."), cert. denied, 516 U.S. 1083 (1996); see also *United States* v. *Bollin*, 264 F.3d 391, 411 (noting that in *Heater* the court had affirmed a perjury conviction "because the question did not contain any fundamental ambiguity that would have prevented the jury from considering the question"), cert. denied, 534 U.S. 935 (2001), and 535 U.S. 989 (2002); *United States* v. *Gunther*, No. 96-4804, 1998 WL 29259, at *3-*4 (Jan. 28, 1998) (unpublished) (affirming defendant's perjury conviction because "[a]n inquiry is not rendered fundamentally ambiguous merely because 'the words in question have different meanings in different situations'") (quoting *Lighte*, 782 F.2d at 375). Indeed, even in a case where the facts made the Fourth Circuit "sympathetic" to the defendant's claim that the questions posed to him were susceptible to an alternative interpretation that would have made his answers truthful, the Fourth Circuit nonetheless affirmed the perjury conviction because it was "satisfied" that the context "provided the jury an adequate basis upon which to conclude that [the defendant] understood" the questions as the government intended and "that he deliberately lied" in his responses. *United States* v. *Bryan*, 58 F.3d 933, 960 (1995). In light of those cases, petitioner is unable to demonstrate a square

conflict between the Ninth Circuit's rule (adopted by every other circuit) and that of the Fourth Circuit.

In any event, this case is not a good vehicle for resolving any tension between the Ninth Circuit and the Fourth Circuit. Petitioner argued below only that the false statement allegations in the indictment were impermissible because they were based on "fundamentally ambiguous" questions. She did not ask the courts to apply a more protective standard, nor did she bring the courts' attention to the Fourth Circuit's decision in *Race*. See Pet. C.A. Br. 40-48 (No. 02-50495). Accordingly, because the lower courts had no occasion to consider whether a different standard should be applied, this case is a poor vehicle for resolution of that issue.

b. The Ninth Circuit applied the correct standard in evaluating any ambiguity in the challenged questions that were the basis of some of the false statement allegations in the indictment. "Almost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact." *Chapin*, 515 F.2d at 1279-1280 (quoting *United States* v. *Ceccerelli*, 350 F. Supp. 475, 478 (W.D. Pa. 1972)). To preclude prosecution whenever a question is somewhat ambiguous, as petitioner advocates, even though the evidence is sufficient for the jury to conclude beyond a reasonable doubt that a particular defendant understood the question as it was intended and answered it falsely, would severely limit the reach of false statements statutes and thereby significantly impede Congress's efforts to promote truth-telling in government matters.

Contrary to petitioner's contention (Pet. 17-18), the rule applied by the Ninth Circuit and the other courts of appeals does not violate due process principles of fair notice. Under the court of appeals' rule, a jury may find

a defendant guilty only after concluding that the defendant understood the question as the government did and, having that understanding, answered falsely. Such a rule, with its requirement of a finding that a defendant had knowledge of the falsity of her statement before allowing conviction, is more than sufficient to give a person of ordinary intelligence fair notice of the type of conduct that is forbidden. Cf. *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 526 (1994) (scienter requirement in criminal statute "assists in avoiding any vagueness problem").

Petitioner's reliance (Pet. 17, 19) on *Bronston* v. *United States*, 409 U.S. 352 (1973), is also misplaced. In *Bronston*, this Court held that an individual could not be convicted of perjury under 18 U.S.C. 1621 for giving an answer that was literally true, even if it was not responsive and arguably misleading. In that case, the defendant was asked under oath whether he had ever had any accounts in Swiss banks. 409 U.S. at 354. He answered that his company had previously had an account in a Swiss bank, but failed to disclose that he had personally had such an account as well. *Ibid.* The defendant's answer was literally true, because the company had in fact had such an account. *Ibid.* The Court reversed the defendant's conviction. *Id.* at 362. *Bronston*'s rule is not helpful to petitioner because it is "limited to cases in which the statement is indisputably true, though misleading because it was unresponsive to the question asked. Different rules govern statements that are ambiguous, in which the statement may be true according to one interpretation and false according to another." *United States* v. *Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004), cert. denied, 546 U.S. 827 (2005); see *United States* v. *DeZarn*, 157 F.3d 1042, 1051 (6th Cir. 1998)

(*Bronston* defense "applies in cases where a perjury defendant responds to a question with an *unresponsive* answer"); *Ryan*, 828 F.2d at 1014 (*Bronston* would "only be operative in those cases in which the defendant has been accused of making a statement that is both unresponsive and literally true"). Here, petitioner does not contend that her responses were "indisputably true" but misleading because not responsive. She contends only that she did not respond falsely to one reasonable construction of an allegedly ambiguous question. Therefore, *Bronston* is inapplicable.[3]

2. Petitioner challenges (Pet. 24-37) the restitution order based on her claim that it is premised in part on conduct of which she has not been convicted, "whether because of acquittal or because the conduct was never charged in the indictment." Pet. 36. She argues that the district court's restitution order is not authorized under the Victim and Witness Protection Act of 1982 (VWPA)[4]

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[3] Petitioner does not appear to challenge here the court of appeals' application of its rule to the facts of this case. In this Court, petitioner argues only that the questions were "ambiguous," not that they were "fundamentally ambiguous" or that the evidence was insufficient to find that she provided false answers to the questions as she understood them. Pet. 20. In any event, the court of appeals correctly rejected petitioner's challenges on those grounds below (Pet. App. 45a-47a), and such a factbound issue would not merit this Court's review.

[4] The VWPA was enacted in 1982 and is currently codified at 18 U.S.C. 3663 & 3664 (2000 & Supp. V 2005). The Mandatory Victims Restitution Act of 1996 (MVRA) was enacted in 1996 and is codified at 18 U.S.C. 3663A. The MVRA addresses mandatory restitution, while the VWPA addresses discretionary restitution. The VWPA applies in this case because the offense conduct took place before 1996. The statutory language at issue in this case is contained in both the VWPA and the MVRA, and therefore cases discussing either statute are pertinent. See *United States* v. *Grice*, 319 F.3d 1174, 1177-1178 (9th Cir.), cert. denied, 539 U.S. 950 (2003).

and that this Court's review is warranted because the circuits are in conflict on whether restitution can be based on acquitted conduct. She also contends that the court of appeals' interpretation of the VWPA violates the Sixth Amendment right to trial by jury. Significantly, in light of the district court's methodology for calculating restitution, this case does not present the questions on which petitioner seeks review. In any event, the court of appeals correctly upheld the restitution order, and there is no square conflict among the circuit courts. Petitioner's claims therefore do not merit further review.

a. The VWPA provides that a court may order a "defendant convicted of an offense" under the federal criminal code to "make restitution to any victim of such offense." 18 U.S.C. 3663(a)(1)(A) (Supp. V 2005). In *Hughey* v. *United States*, 495 U.S. 411 (1990), the Court held that the VWPA "authorize[d] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 413. After that decision, Congress amended the VWPA (Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4863) to provide that, when an offense "involves as an element a scheme, conspiracy, or pattern of criminal activity," restitution may be ordered to "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663(a)(2).

Here, the district court ordered restitution based on the conspiracy alleged in Count 1. Petitioner was convicted of conspiring to conceal assets in contemplation of bankruptcy, to make false statements under oath in relation to bankruptcy, and to conceal assets of the bank-

ruptcy estate. Pet. App. 148a-149a. Although Count 1 specified three assets concealed by petitioner— her interest in BBL, her interest in Beverly Hills Medical, and her equity in the Utah condo—the indictment made clear that the specified "means of the conspiracy" and "overt acts" were not all-inclusive. *Id.* at 150a, 161a. The indictment also alleged as "the purpose of the conspiracy" not merely the protection of those three specific assets, but enabling petitioner and her husband "to discharge their outstanding debts * * * while maintaining control over and access to" property concealed in anticipation of bankruptcy and property of the bankruptcy estate. *Id.* at 149a. The district court found that restitution was owed to all the creditors whose claims had been discharged in bankruptcy because, if petitioner had acted lawfully and not engaged in a conspiracy to conceal assets, she would not have been eligible for bankruptcy relief because her assets exceeded her liabilities. *Id.* at 88a-89a; see *id.* at 24a (upholding district court's restitution order because "had [petitioner] acted lawfully, the value of the assets exceeded the debts to be discharged and therefore the actual loss to the creditors equaled the amount of debt actually discharged in the bankruptcy"). Because all those creditors were "directly harmed by the defendant's criminal conduct in the course of the * * * conspiracy," restitution was justified under the text of the VWPA. 18 U.S.C. 3663(a)(2).

At the threshold, in light of the district court's method for calculating restitution, this case is a poor vehicle for considering whether restitution may be based on acquitted conduct or conduct not specifically charged in the indictment, because the restitution ordered here is not specifically tied to such conduct. Those issues would be presented if, for example, the district court had based

restitution on the total value of all items it found to be illegally concealed and, in calculating that total, had included the value of the Utah condo (which petitioner was acquitted of fraudulently concealing in Count 4) as well as assets not specifically identified in the indictment (but found to be illegally concealed by a preponderance of the evidence). The district court, however, employed a different approach: it found that, had petitioner not engaged in the Count 1 conspiracy, she would not have been entitled to discharge in bankruptcy because her assets (which would necessarily include all her assets, whether fully disclosed, inadvertently omitted, or illegally concealed) were greater than her liabilities. Thus, it was not necessary to the district court's restitution order that it find that petitioner had conspired illegally to conceal her interest in the Utah condo or to fail to disclose her interests in other property not specified in the indictment. Regardless, those assets would have been included in the district court's calculation of the total assets to attribute to petitioner in determining whether she would have been entitled to a discharge in bankruptcy. Accordingly, this case does not present the questions on which petitioner seeks review.

b. Further, and contrary to petitioner's suggestion, the decision below does not directly conflict with rulings from other courts of appeals. Indeed, petitioner does not even allege a conflict among the circuits on whether restitution may be based on conduct not specifically charged in the indictment in a conspiracy case. She only alleges a conflict on whether acquitted conduct may be used in calculating restitution, where such conduct is also in furtherance of a scheme or conspiracy of which the defendant has been convicted.

Petitioner principally asserts a conflict with the Seventh Circuit's decision in *United States* v. *Kane*, 944 F.2d 1406, 1414 (1991). In that case, the district court had ordered a defendant to pay restitution for the full amount of loss caused by a bank fraud conspiracy, even though the defendant had been acquitted of two out of five specific incidents of submitting a fraudulent loan application, each of which had been alleged as overt acts of the conspiracy. The Seventh Circuit vacated the restitution order, holding that "the jury's acquittal" on two counts "must be taken as a judgment that the conspiracy did not include the acts charged in those counts." *Id.* at 1414. As the court of appeals here correctly reasoned, however, reliance on the ruling in *Kane* is "misplaced because the acts in that case occurred well before the effective date of this amendment to the VWPA," Pet. App. 21a-22a n.12, which "changed the definition of 'victim' to partially overrule *Hughey* and allow restitution beyond the specific acts of conviction." *United States* v. *Grice*, 319 F.3d 1174, 1177 (9th Cir.), cert. denied, 539 U.S. 950 (2003). Because the Seventh Circuit might well come to a different conclusion based on its interpretation of the amended statute, resolution of any tension between the approach taken in *Kane* and the other circuits would be premature.

The other Seventh Circuit cases cited by petitioner do not pose any conflict. They either do not involve convictions for offenses that contain a scheme, conspiracy, or pattern as an element,[5] or simply recite the standard that restitution must be tied to the offense of conviction

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[5] See *United States* v. *Frith*, 461 F.3d 914, 920-921 (7th Cir. 2006); *United States* v. *Randle*, 324 F.3d 550, 556-557 (7th Cir. 2003); *United States* v. *Polichemi*, 219 F.3d 698, 706, 714 (7th Cir.), cert. denied, 531 U.S. 993 (2000), and 531 U.S. 1168 (2001).

without addressing acquitted conduct.[6] In agreement with the Ninth Circuit, the Seventh Circuit acknowledges that, where the offense of conviction includes a scheme, conspiracy, or pattern as an element, restitution may be ordered for all "actions pursuant to that scheme," even if not specifically charged in the indictment. *United States* v. *Bennett*, 943 F.2d 738, 740 (1991), cert. denied, 504 U.S. 987 (1992); see *United States* v. *Turino*, 978 F.2d 315, 319 (7th Cir. 1992), cert. denied, 508 U.S. 975 (1993).

Nor is petitioner able to demonstrate a square conflict with the Third Circuit. Petitioner's reliance on *United States* v. *Pedroni*, 45 Fed. Appx. 103, cert. denied, 537 U.S. 1045 (2002), and *United States* v. *Console*, 13 F.3d 641 (1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994)—both of which rejected a defendant's argument that a restitution award was excessive—is misplaced. In dicta, the Third Circuit did state (despite little analysis) that a district court acted properly in not awarding restitution based on a "loss associated with the charges for which [the defendant] was acquitted." *Pedroni*, 45 Fed. Appx. at 111 n.13; see *Console*, 13 F.3d at 674. But *Pedroni* is an unpublished decision and the dicta in *Console*, like the Seventh Circuit's decision in *Kane*, predates the VWPA amendment. Petitioner cites no case in which the Third Circuit has vacated an order requiring restitution for the losses associated with an entire conspiracy or scheme based on the defendant's acquittal in another count.

Finally, petitioner's reliance on the Fifth Circuit's decision in *United States* v. *Adams*, 363 F.3d 363 (2004),

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[6] See *United States* v. *George*, 403 F.3d 470, 474 (7th Cir.), cert. denied, 546 U.S. 1008 (2005); *United States* v. *Bennett*, 943 F.2d 738, 740 (7th Cir. 1991), cert. denied, 504 U.S. 987 (1992).

is misplaced. Like many of the other cases cited by petitioner, *Adams* did not involve acquitted conduct. In *Adams*, the Fifth Circuit held only that, "when a defendant pleads guilty to fraud, the scope of the requisite scheme to defraud, for restitution purposes, is defined by the mutual understanding of the parties rather than the strict letter of the charging document." *Id.* at 364. Nothing in *Adams* disturbs the Fifth Circuit's prior holding in *United States* v. *Chaney*, 964 F.2d 437, 452-453 (1992), that restitution may be ordered for loss caused by an entire conspiracy, even where the defendant was acquitted of some of the conduct also alleged to be in furtherance of the conspiracy.[7]

c. Regardless of any claimed conflict, petitioner is incorrect on the merits. Count 1 charged a broad conspiracy to conceal assets. As stated in a case relied on by petitioner, because proof of the conspiracy is an element of the offense of conviction, "actions pursuant to that [conspiracy] should be considered 'conduct that is the basis of the offense of conviction'" under *Hughey*.

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[7] Petitioner also cites *United States* v. *Jeffery*, No. 93-6295, 1994 WL 468099, at *9 (10th Cir. Aug. 25, 1994) (unpublished), cert. denied, 513 U.S. 1196 (1995), for the proposition that, in a conspiracy case involving a scheme to defraud, restitution may not be ordered for acts pursuant to the scheme but not specifically charged in the indictment. *Jeffery*, however, is an unpublished decision that relied on cases from other circuits involving conduct that predated the 1990 VWPA amendment. *Id.* at *9 n.1. In subsequent published cases, the Tenth Circuit has made clear that the VWPA as amended allows restitution for losses associated with "the broader scheme" alleged in a count of conviction, where the offense involves a scheme, conspiracy, or pattern of criminal activity. *United States* v. *Berger*, 251 F.3d 894, 898 n.2 (2001) (citing *United States* v. *Hensley*, 91 F.3d 274, 277 (1st Cir. 1996)); see *United States* v. *Gordon*, 480 F.3d 1205, 1211 (2007).

Bennett, 943 F.2d at 740 (quoting *Hughey*, 495 U.S. at 414). Accordingly, as the court of appeals correctly reasoned, when a restitution order is based on a conspiracy conviction, a court can order restitution for losses resulting from any conduct that was part of the conspiracy "and not just from specific conduct that met the overt act requirement of the conspiracy conviction." Pet. App. 22a (quoting *United States* v. *Reed*, 80 F.3d 1419, 1423 (9th Cir.), cert. denied, 519 U.S. 882 (1996)); see *United States* v. *Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) ("Thus, the outer limits of a VWPA § 3663(a)(2) restitution order encompass all direct harm from the criminal conduct of the defendant which was within any scheme, conspiracy, or pattern of activity that was an element of any offense of conviction."); *Turino*, 978 F.2d at 319 ("because the scheme is an element of the offense of mail fraud, a conviction for mail fraud can support a conviction for a broad scheme even though the defendant is not specifically convicted for each fraudulent act encompassed within this scheme").

Nor would the fact that petitioner had been acquitted on some other count preclude a court, under the plain text of the statute or the reasoning of *Hughey*, from ordering full restitution for the conspiracy count on which petitioner was convicted. Petitioner's argument, at bottom, is a challenge alleging "inconsistencies in the jury's verdict." *Chaney*, 964 F.2d at 452 (rejecting argument that "[r]estitution under the Victim and Witness Protection Act is forbidden for losses that may be attributed to conduct that is the basis of charges for which the defendant is acquitted") (citation omitted). But "an irreconcilable jury verdict does not warrant reversal of a criminal conviction * * * because each count in an indictment is to be considered as a separate indictment." *United*

States v. *Walker*, 9 F.3d 1245, 1248 (7th Cir. 1993) (citations omitted), cert. denied, 511 U.S. 1096 (1994). Likewise, as at least four courts of appeals agree, the validity of a restitution order as to one count of conviction is not undermined by a defendant's acquittal on a separate count, even where the latter charge involves some of the same conduct as the former charge. See *United States* v. *Boyd*, 222 F.3d 47, 51 (2d Cir. 2000) ("[T]he VWPA confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts."); see also *United States* v. *Foley*, 508 F.3d 627, 635-636 (11th Cir. 2007); *United States* v. *Booth*, 309 F.3d 566, 575-576 (9th Cir. 2002); *Chaney*, 964 F.2d at 452. That is particularly true here, where petitioner's acquittal on a *substantive* charge of concealing her interest in the Utah condo is not necessarily inconsistent with a charge that she and her co-conspirators *conspired* to conceal that asset, among others.

d. Petitioner's claim (Pet. 37) that the Ninth Circuit's interpretation of the VWPA as authorizing restitution based on acquitted conduct violates her Sixth Amendment right to trial by jury merits no further review. As discussed below (pp. 22-23, *infra*), all the circuits correctly have held that a court may consider acquitted conduct at sentencing. Furthermore, all nine courts of appeals to have considered the issue have correctly rejected the argument that restitution must be determined by a jury. See *United States* v. *Milkiewicz*, 470 F.3d 390, 403-404 (1st Cir. 2006) (collecting cases). And this case is not a good vehicle for resolving that issue because, as explained above (p. 15, *supra*), the restitution order did not depend on a finding that the Utah condo was illegally concealed, and, moreover, the court

of appeals did not address the constitutionality of the restitution order.

3. Petitioner contends (Pet. 38-40) that her Sixth Amendment rights were violated because the district court, in determining her sentence of imprisonment, relied in part on conduct underlying Count 4, on which she had been acquitted. The court's loss calculation, however, did not depend on a finding that petitioner illegally concealed the Utah condo, and therefore this case does not raise the question on which petitioner seeks review. See p. 15, *supra*. In any event, as the government has explained in briefs in opposition to other petitions raising the acquitted conduct issue, this Court's review is unwarranted. See, *e.g.*, Gov't Br. in Opp. at 8-13, *Mercado* v. *United States*,128 S. Ct. 1736 (2008); Gov't Br. in Opp. at 7-13, *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008).

In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles rather than the Sixth Amendment, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *ibid.* That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Since *Booker*, every court of appeals has held that a district court may consider acquitted conduct at sen-

tencing. See *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 07-1291, 2008 WL 1751518 (May 12, 2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409, 410 (4th Cir. Sept. 6, 2007), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert denied, 127 S. Ct. 691 (2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).[8]

This Court has recently denied petitions raising the issue. See, *e.g.*, *Hurn* v. *United States*, 128 S. Ct. 1737 (2008); *Mercado* v. *United States*, 128 S. Ct. 1736 (2008); *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008). There is no reason for a different result here.[9]

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[8] After the Sixth Circuit in *Mendez* upheld a district court's consideration of acquitted conduct at sentencing, it granted rehearing en banc in a separate case raising the same issue. See *United States* v. *White*, 503 F.3d 487 (2007) (vacated and rehearing en banc granted by unpublished order dated November 30, 2007; argued June 4, 2008).

[9] Contrary to petitioner's suggestion, there is no need to hold this case pending the Court's decision in *Oregon* v. *Ice*, cert. granted, No. 07-901 (Mar. 17, 2008), which raises the separate question whether the Sixth Amendment is violated by the imposition of consecutive

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2008

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sentences based on a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

(3)

No. 07-1262

FILED

JUN 17 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

LETANTIA BUSSELL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

A. The United States' Attempt To Downplay The Circuit Conflict On The False Statements Standard Misreads Fourth Circuit Law 1

B. This Case Presents An Appropriate Vehicle For Resolution Of The Conflict On The Law Of False Statements And For Reversal Of The Ninth Circuit 5

C. The Statutory Question Of Restitution Based On Conduct Of Which The Defendant Was Not Convicted Squarely Presents Another Circuit Split That Requires This Court's Review 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....12

Bronston v. United States, 409 U.S. 352 (1973) 6, 7

Hughey v. United States, 495 U.S. 411 (1990).....11

MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2007).....5

United States v. Bennett, 943 F.2d 738 (7th Cir. 1991), *cert. denied*, 504 U.S. 987 (1992).....11

United States v. Bollin, 264 F.3d 391 (4th Cir.), *cert. denied*, 534 U.S. 935 (2001).....4

United States v. Booth, 309 F.3d 566 (9th Cir. 2002).....10

United States v. Bryan, 58 F.3d 933 (4th Cir. 1995).....4

United States v. Camper, 384 F.3d 1073 (9th Cir. 2004), *cert. denied*, 546 U.S. 827 (2005).....1

United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994).....10

United States v. Culliton, 328 F.3d 1074 (9th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004) 3, 5

United States v. George, 403 F.3d 470 (7th Cir.), *cert. denied*, 546 U.S. 1008 (2005).....10, 11

United States v. Gunther, No. 96-4804, 1998 WL 29259 (4th Cir., Jan. 28, 1998).....4

United States v. Heater, 63 F.3d 311 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996).....3, 4

TABLE OF AUTHORITIES—Continued

Page

United States v. Kane, 944 F.2d 1406 (7th Cir. 1991) 9, 12

United States v. Polichemi, 219 F.3d 698 (7th Cir. 2000), *cert. denied*, 531 U.S. 1168 (2001) 10

United States v. Pedroni, 45 Fed. Appx. 103 (3d Cir.), *cert. denied*, 537 U.S. 1045 (2002) 10

United States v. Race, 632 F.2d 1114 (4th Cir. 1980) 1, 2, 4

United States v. Randle, 324 F.3d 550 (7th Cir. 2003) 11

STATUTES

18 U.S.C. § 3663(a)(2) 9

Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (1982) 9

REPLY BRIEF FOR PETITIONER

A. The United States' Attempt To Downplay The Circuit Conflict On The False Statements Standard Misreads Fourth Circuit Law

1. The United States suggests that the conflict regarding the legal standard for a conviction for a false statement does not warrant review because it is not a "square" conflict. Br. in Opp. 9. The Ninth Circuit itself, however, has recognized that "the Fourth Circuit takes a very different approach" than it does. *United States v. Camper*, 384 F.3d 1073, 1077 (9th Cir. 2004), *cert. denied*, 546 U.S. 827 (2005). Indeed, in this case, the Ninth Circuit upheld a conviction for false statements as valid even though the allegedly false statements are true under a reasonable construction of the government's ambiguous questions. The Fourth Circuit would invalidate that conviction as a violation of due process.

In arguing that this Circuit conflict does not merit review, the government relies on mistaken assumptions about the legal standard that the Fourth Circuit established in *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980). *Race* held that a conviction for making false statements in response to an ambiguous government contract "cannot stand" if the statements were accurate under "a reasonable construction of the contract." *Id.* at 1120.

The government attempts to narrow the import of the *Race* case by contending that "there was no

evidence in that case to support a finding that the defendants had acted in bad faith." Br. in Opp. 9 (citing *Race*, 632 F.2d at 1120-1121). The Fourth Circuit, however, placed no significance on the presence or absence of evidence of the defendants' bad faith in *Race*. To the contrary, the Fourth Circuit expressly held that "it makes no difference what the defendants thought" was meant by the government contract that elicited the allegedly false statement—the false statement conviction could not stand because the defendants' response was consistent with one reasonable interpretation of the government contract. *Race*, 632 F.2d at 1120. The government's citation (Br. in Opp. 9) to the court's reference to the absence of bad faith evidence, *Race*, 632 F.2d at 1121, misreads this case because the court's discussion was only "if it be assumed that the defendants' good faith in their construction of the contract is important," *id.* at 1120-1121, and the court held that it was not.

Race makes clear that, under Fourth Circuit law, whether an allegedly false statement is false turns solely on the legal determination that the statement is objectively false under all reasonable interpretations of the question to which the statement responds. *Ibid.* Moreover, *Race* specifies that only after that first element is established does the subjective intent of a defendant become relevant. The second element that must be established is that the subjective intent of the defendant was such that he knew the statement was false. *Ibid.* The subjective intent of the defendant thus "becomes important if, but only if, the

[statement] was false, that is, was not within [a] reasonable construction of the [question]." *Id.* at 1120.

This squarely conflicts with the Ninth Circuit rule which finds no due process flaw in a false statement conviction based on a response that is true under a reasonable construction of the question if the defendant acted in "bad faith" in construing ambiguous terms of the question. Unlike the Fourth Circuit, the Ninth Circuit would reverse such a conviction only if the question is "fundamentally ambiguous," by which the Ninth Circuit and several other Circuits (Pet. 14-15) mean something more than that the question is susceptible to more than one reasonable interpretation, *i.e.* they mean that persons "of ordinary intelligence cannot arrive at a mutual understanding of [the question's] meaning." *United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) (quoting *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003)).

2. The Fourth Circuit cases cited by the government that were decided after *Rose* (Br. in Opp. 10) have not eliminated the Circuit conflict.

In *United States v. Heater*, 63 F.3d 311, 327 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996), the court did not rule that a perjury conviction is precluded only if the question is "fundamentally ambiguous." Rather, the Fourth Circuit held that the questions there were "neither vague nor misleading" and that the evidence demonstrated the defendant's answers were "deliberately false." *Ibid.* This is consistent with the

Race standard. *Heater*'s reference to the "fundamental ambiguity" language from a Seventh Circuit perjury case merely expressed the Fourth Circuit's agreement that a perjury prosecution may proceed where the question asked was *not* ambiguous. That reference did not somehow overrule, *sub silentio*, Fourth Circuit precedent on whether a false statement conviction may be sustained when the government's question *is* ambiguous. And *United States v. Bollin*, 264 F.3d 391, 411 (4th Cir.), *cert. denied*, 534 U.S. 935 (2001), merely cites to *Heater* and explains that the conviction in *Heater* was proper, using the terminology that *Heater* employed. *Ibid.* The Fourth Circuit did not purport to employ any "fundamental ambiguity" test in *Bollin*.

In *United States v. Gunther*, No. 96-4804, 1998 WL 29259 (4th Cir., Jan. 28, 1998), the Fourth Circuit rejected the defendant's assertion that the question was completely incomprehensible, noting that "[a] question is fundamentally ambiguous only when 'it is entirely unreasonable to expect that the defendant understood the question posed to him.'" *See id.* at *3 (citation omitted). There is no indication that the Fourth Circuit was overruling *Race* or adopting the Ninth Circuit's "fundamental ambiguity" test, especially given the unpublished and non-binding nature of *Gunther*.

In *United States v. Bryan*, 58 F.3d 933, 960 (4th Cir. 1995), there was no ambiguity in the government's question that might otherwise have rendered the defendant's response true under an

alternative construction. The court explained that the "prosecutor's repeated inquiry" to the witness had eliminated any other interpretations, and that the evidence permitted the jury to conclude that the defendant "deliberately lied." *Id.* at 960.

B. This Case Presents An Appropriate Vehicle For Resolution Of The Conflict On The Law Of False Statements And For Reversal Of The Ninth Circuit

1. The United States' suggestion (Br. in Opp. 11) that petitioner somehow did not preserve her challenge to her conviction for false statements is without merit. Petitioner properly argued below, under binding Ninth Circuit precedent, that the government's question was fundamentally ambiguous and that her conviction for falsely responding therefore violated due process. Pet. C.A. Br. 41-48 (No. 02-50495) (citing *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004)). Petitioner's Ninth Circuit panel had no authority to overrule *Culliton*. *See MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764, 770 (2007). In any event, the Ninth Circuit here did not rest merely on its view that the government's questions were not fundamentally ambiguous. The court also held that, if ambiguity existed, there was evidence of petitioner's subjective understanding of the questions and that such evidence could have permitted the jury to find petitioner had answered the questions falsely as she understood them regardless of the ambiguity (*i.e.*,

regardless of whether her answers were true under other reasonable interpretations). Pet. App. 44a-45a. Hence, the court of appeals directly addressed the issue presented for review.

The matter is not one of sufficiency of evidence as the government implies, Br. in Opp. 13 n.3, and, in any event, petitioner argued below, and repeated in the *certiorari* petition, that the prosecution had not provided any evidence of her understanding of the ambiguous terms that were the basis for her conviction. *See* Pet. 23 n.3; Pet. C.A. Br. 48-54 (No. 02-50495). Thus, petitioner did not waive any arguments related to the government's alternative characterization of the question presented.

2. The Ninth Circuit's rule violates due process and is contrary to this Court's holding in *Bronston v. United States*, 409 U.S. 352 (1973).

The government attempts to distinguish *Bronston* by citing lower court authorities that treat misleading and unresponsive, but literally true, answers more favorably than answers that are objectively true under a reasonable interpretation of a question. Br. in Opp. 12-13. But *Bronston* clearly rests on the fundamental principle that the subjective intent of a defendant in providing an answer does not control the issue of whether his perjury or false statement conviction satisfies due process. *See Bronston*, 409 U.S. at 359 ("[a] jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face,

was intended to mislead or divert the examiner"). Under *Bronston*, due process prevents a conviction even if the defendant knows what is being called for and responds with an intent to mislead. *Ibid.* Thus, due process prevented petitioner's conviction even if she subjectively understood that the bankruptcy form's request for a list of "interests" included legal and beneficial "interests," because it is reasonable to interpret "interests" to mean legal interests alone and her answer under that interpretation was not false. As in *Bronston*, a truthful response to this latter interpretation may mislead, but due process requires the government to bear the burden of clarity, and a false statement conviction cannot rest on a subjective intent to evade alone. *Id.* at 360.

C. The Statutory Question Of Restitution Based On Conduct Of Which The Defendant Was Not Convicted Squarely Presents Another Circuit Split That Requires This Court's Review

1. The government is wrong that the restitution order in this case did not rely on findings about conduct of which petitioner had been acquitted and not indicted. Br. in Opp. at 15, 21.

The government claims that the restitution order rested solely on a finding that petitioner obtained a discharge in bankruptcy that she was not entitled to receive because her total assets were, in fact, greater than her liabilities. Br. in Opp. at 16. But the

restitution order was not based on the value of "all" of petitioner's assets, *ibid.*; rather, it was based on the amount of *debt* that was discharged as a result of the bankruptcy. Pet. App. 54a-55a. The court of appeals made clear that the discharge was attributable to the district court's adoption of the values and analysis in the presentence report, which had concluded that petitioner's "concealed assets"—*including* the Utah condo of which petitioner was acquitted and certain assets that had not been charged in the indictment—were valued at between $2.84 and $3.35 million, and that when the value of those undisclosed assets was "[c]ombined" with the assets petitioner reported, that assets total exceeded petitioner's total debt. Pet. App. 19a.

The district court did *not* find, and the record does not demonstrate, that petitioner's assets would have exceeded her debts if the acquitted and unindicted assets that were included in the PSR's "concealed assets" amount had not factored into the total. In fact, the acquitted and uncharged assets had a direct impact on the restitution amount in this case because the district court accepted the government's argument that "the scope of the conspiracy with which [petitioner] was charged and convicted * * * goes beyond the two bank accounts she was convicted of concealing." Pet. App. 83a, 88a. And it was only by virtue of the court's inclusion of the Utah condo and the unindicted assets that it concluded that bankruptcy was not otherwise appropriate and that

the actual loss equaled the entire amount of the discharge. Pet. App. 20a.[1]

Moreover, the Ninth Circuit specifically addressed the issue of restitution under the VWPA (Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982)) for acquitted and uncharged conduct. Pet. App. 20a-21a. And the government did not object to the court reaching this issue precisely because the district court had "consider[ed] concealed assets beyond the two assets in which [petitioner] was indicted and convicted of concealing." *Id.* at 21a.

2. The government attempts to distinguish the ruling in this case from clearly conflicting authority of the Seventh and Third Circuits that prohibits use of acquitted conduct for restitution—*United States v. Kane*, 944 F.2d 1406, 1414-1415 (7th Cir. 1991), and

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[1] The government is mistaken that a finding of fraudulent concealment regarding specific assets does not matter because restitution may properly rest on a valuation of "all" of a debtor's assets—even those that were "fully disclosed" or "inadvertently omitted." Br. in Opp. at 16. As the government concedes, the Victim and Witness Protection Act (VWPA) authorizes the payment of restitution only for losses caused by the defendant's *criminal conduct*. Br. in Opp. 15 (quoting 18 U.S.C. § 3663(a)(2)). Thus, the district court's finding that the total asset amount would not have entitled petitioner to declare bankruptcy is not the end of the inquiry for *restitution* purposes; it must also be the case that the debtor's *fraudulent concealment*, as opposed to mere inadvertant omission, was the cause of the mistaken conclusion that petitioner was entitled to bankruptcy protection.

United States v. Console, 13 F.3d 641, 674 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994)—on the ground that those cases were decided before Congress amended the "victim" provision of the VWPA. Br. in Opp. 17, 18.

But *Kane* and *Console* have not been overruled, and more recent opinions from those Circuits confirm these precedents. *See United States v. George*, 403 F.3d 470 (7th Cir.), *cert. denied*, 546 U.S. 1008 (2005); *United States v. Pedroni*, 45 Fed. Appx. 103 (3d Cir.), *cert. denied*, 537 U.S. 1045 (2002). Indeed, *Kane* and *Console* are so engrained as the established law of those jurisdictions that *federal prosecutors there no longer challenge the point. See United States v. Polichemi*, 219 F.3d 698, 714 (7th Cir. 2000) ("The government concedes that restitution cannot be ordered that relates to conduct for which the defendant has been acquitted." (citing *Kane*, 944 F.2d at 1415)), *cert. denied*, 531 U.S. 1168 (2001); *Pedroni*, 45 Fed. Appx. at 111 (similar).

As for restitution relying on unindicted conduct, the government vastly overstates its argument when it asserts that the Seventh Circuit is "[i]n agreement with the Ninth Circuit." Br. in Opp. 18. In the Ninth Circuit's view, "[r]estitution is * * * not confined to harm caused by the particular offenses of which [the defendant] was convicted," and as a result, the VWPA permits restitution to be ordered for "the entire amount of loss caused to victims of the scheme." *United States v. Booth*, 309 F.3d 566, 575-576 (9th Cir. 2002). In the Seventh Circuit's much narrower

view, "[b]oth the restitution award and the persons to whom such award may be directed are *limited* by the *circumstances* of the offense for which the defendant has been convicted." *United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003) (emphasis altered). In clear contrast to the Ninth Circuit, the Seventh Circuit holds that restitution cannot be awarded on the basis of an "amorphous" general scheme; rather, the prosecution must define the alleged scheme "with specificity," *United States v. Bennett*, 943 F.2d 738, 741 (7th Cir. 1991), *cert. denied*, 504 U.S. 987 (1992), and the court must "exclude injuries caused by offenses that are not part of the scheme," *George*, 403 F.3d at 474.

3. The Seventh and Third Circuits are correct that the VWPA does not authorize restitution for acquitted conduct. The statutory text compels that conclusion, and *Hughey v. United States,* 495 U.S. 411, 418 (1990), confirmed that the VWPA requires that restitution "be tied to the loss caused by the offense of conviction." The Circuit conflict on the meaning of the post-*Hughey* amendment to the VWPA (Pet. 35) is another reason review is warranted here.

The government's characterization of the question of restitution based on acquitted conduct as a mere challenge to inconsistencies in the jury's verdict is mistaken. Br. in Opp. 20. Although each count of an indictment might ordinarily be considered separately, *ibid.*, here, as in most conspiracy cases, the indictment links the conspiracy with the substantive underlying acts, which are alleged as separate counts

but incorporated into the conspiracy count as well. *See* Pet. App. 150a, 153a-154a. Having created the connection, the government cannot now decry the jury's conclusion that some of the acts alleged were not, in fact, part of the conspiracy of which petitioner was convicted. *See Kane*, 944 F.2d at 1414 ("[T]he jury's verdicts, taken collectively, narrow the scope of the conspiracy in which [defendant] participated.").

The Ninth Circuit's reading of the VWPA is also questionable because it enables prosecutors to define the scope of a conspiracy for restitution purposes without proving to a jury that the defendant engaged in the specific acts that caused the particular losses that are the basis for the restitution award. Because this Court has already held that the Constitution prohibits increases in punishment beyond the statutory maximum on the basis of facts that have not been determined by a jury, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the conclusion that this construction of the VWPA's restitution provision is constitutional (Br. in Opp. 21) is doubtful at best.[2]

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[2] That the Ninth Circuit "did not address the constitutionality of the restitution order" (Br. in Opp. 22) is of no moment. The Ninth Circuit interpreted the statute, and petitioner objected to the restitution order on several grounds, including that it violated her Sixth Amendment rights.

The government notes that the Court recently denied *certiorari* in some cases raising the issue of whether a court can consider acquitted conduct when fashioning a defendant's term of imprisonment. Br. in Opp. 22. Petitioner maintains that this significant constitutional question regarding imprisonment

(Continued on following page)

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of *certiorari* should be granted or, in the alternative, the case should be held pending the Court's disposition of *Oregon v. Ice*, No. 07-901.

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merits review (*see* Pet. 38-40), and that this case presents a particularly appropriate vehicle to resolve the imprisonment issue in conjunction with the issue of relying on acquitted and unindicted conduct for restitution.